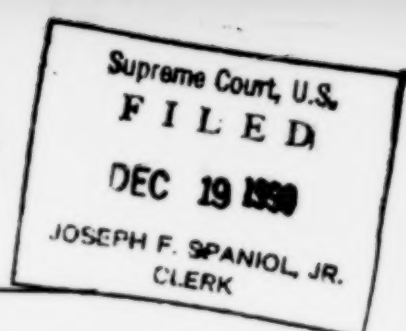


①
90-1004

No. 90-



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE
SUFFOLK COUNTY JAIL,
Respondents,

Petition for a Writ
of Certiorari to the United
States Court of Appeals
for the First Circuit

JAMES M. SHANNON
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS

Douglas H. Wilkins*
Jon Laramore
Assistant Attorneys
General
One Ashburton Pl.
Boston, MA 02108
(617) 727-2200
Counsel for Petitioner

*Counsel of Record



QUESTIONS PRESENTED

1. Are modifications of consent decrees regarding public institutions to be decided under the flexible standard, based upon changed circumstances and the public interest, that has been adopted by several circuits, or must the party seeking modification make a clear showing of grievous wrong evoked by new and unforeseen circumstances, as held by the courts below?

2. Does a federal court have the power, when administering a consent decree, to require state officials to provide jail accommodations that far surpass constitutional requirements?

PARTIES TO THE PROCEEDING

The petitioner is identified in the caption.

The Sheriff of Suffolk County, Massachusetts, is filing a separate petition for certiorari, entitled Robert Rufo v. Inmates of Suffolk County Jail.

In addition to the respondents listed in the caption, the following are respondents:

Mayor of Boston;

City Council of Boston;

Deputy Commissioner of Capital
Planning and Operations of
Massachusetts;

Secretary of Administration and
Finance of Massachusetts.

TABLE OF CONTENTS

	<u>Page</u>
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF FACTS AND PRIOR PROCEEDINGS	3
REASONS FOR GRANTING THE WRIT	13
I. CIRCUITS DISAGREE AS TO THE STANDARD FOR MODIFICATION OF CONSENT DECREES GOVERNING PUBLIC INSTITUTIONS.	13
A. The Circuits Are Split Over The Proper Standard For Modification Based on Changed Circumstances.	14
B. The Circuits Are Split Over The Proper Standard Of Modification Based on Change of Law.	19
II. THE COURT SHOULD GRANT THE PETITION BECAUSE OF THE NATIONAL IMPORTANCE OF THE PUBLIC ISSUES IMPLICATED IN MODIFYING FEDERAL CONSENT DECREES.	22
III. THE CIRCUITS ARE DIVIDED ON THE QUESTION OF DISTRICT COURTS' POWERS TO ENFORCE CONSENT DECREES ABSENT CONSTITUTIONAL VIOLATIONS.	26

IV. UNDER THE PROPER STANDARD, THE LOWER COURTS' ORDERS COULD NOT STAND.	31
A. The Judgment Requires Class Members To Be Held in Poorer Facilities.	31
B. The Lower Courts' Decisions Undermine Public Safety.	34
C. This Case Shows the Need For a Flexible Standard.	35
CONCLUSION	38

2963B

TABLE OF AUTHORITIES

Cases

<u>Attorney General v. Sheriff of Suffolk County,</u> 394 Mass. 624, 477 N.E. 2d 361 (1985)	7
<u>Bell v. Wolfish,</u> 441 U.S. 520 (1979)	21, 27
<u>Board of Education of Oklahoma City v. Dowell,</u> No. 89-1080	37
<u>Block v. Rutherford,</u> 468 U.S. 576 (1984)	30
<u>Coalition of Black Leadership v. Cianci,</u> 570 F.2d 12 (1st Cir. 1978)	20
<u>Duran v. Elrod,</u> 760 F.2d 756 (7th Cir. 1985)	17, 19, 23, 35
<u>Firefighters Local Union v. Stotts,</u> 467 U.S. 561 (1984)	29
<u>Heath v. DeCoursey,</u> 888 F.2d 1105 (6th Cir. 1989)	17
<u>Keith v. Volpe,</u> 784 F.2d 1457 (9th Cir. 1986)	14, 16, 18
<u>Lelsz v. Kavanaugh,</u> 807 F.2d 1243 (5th Cir.), <u>reh'g. den.</u> 815 F.2d 1034 <u>cert. dis.</u> 483 U.S. 1057 (1987)	28

<u>Local No. 93 v. City of Cleveland,</u> 478 U.S. 501 (1986)	29
<u>Nelson v. Collins,</u> 659 F.2d 420 (4th Cir. 1981) (en banc)	20, 21, 28
<u>Newman v. Graddick,</u> 740 F.2d 1513 (11th Cir. 1984)	16, 20, 21, 28
<u>New York State Assn. for Retarded Children v. Carey,</u> 706 F.2d 956 (2d Cir.) <u>cert. den.</u> 464 U.S. 915 (1983)	15
<u>Pasadena City Board of Education v. Spangler,</u> 427 U.S. 424 (1976)	29
<u>Pennhurst State School & Hosp. v. Halderman,</u> 465 U.S. 89 (1984)	27
<u>Philadelphia Welfare Rights Org. v. Shapp,</u> 602 F.2d 1114 (3d Cir. 1979) <u>cert. den.</u> 444 U.S. 1026 (1980)	15, 17
<u>Plyer v. Evatt,</u> 846 F.2d 208 (4th Cir.), <u>cert. den.</u> 488 U.S. 897 (1988)	16, 18
<u>Rhodes v. Chapman,</u> 452 U.S. 337 (1981)	21, 27

<u>Ruiz v. Lynaugh,</u> 811 F.2d 856 (5th Cir. 1987)	14, 16, 18, 25
<u>Turner v. Safley,</u> 482 U.S. 78 (1987)	30
<u>Twelve John Does v.</u> <u>District of Columbia,</u> 861 F.2d 295 (D.C. Cir. 1988)	19
<u>United States v. City of</u> <u>Chicago,</u> 663 F.2d 1354 (7th Cir. 1981)	16
<u>United States v. Swift and</u> <u>Company,</u> 286 U.S. 106 (1932)	14, 15, 16
<u>Washington v. Penwell,</u> 700 F.2d 570 (9th Cir. 1983)	28

Federal Statutes

28 U.S.C. § 1254(1)	3
42 U.S.C. § 1983	4

Massachusetts Statutes

M.G.L. c. 124, § 1	4
M.G.L. c. 127, § 16	4
M.G.L. c. 127, § 1A	5
M.G.L. c. 127, § 1B	5
M.G.L. c. 276, § 52A	32
M.G.L. c. 276, § 58	34

Publications

Jost, The Attorney General's Policy on Consent Decrees and Settlement Agreements,
39 Admin. L. Rev. 101 (1987) 24

Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986) 23, 25

Note, Federalism and Federal Consent Decrees Against State Government Entities,
88 Col. L. Rev. 1796 (1988) 24, 25, 29

Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L. Rev. 1020 (1986) 23, 24, 25

Rabkin and Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government,
40 Stanford L. Rev. 203 (1987) 24

No. 90-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GEORGE A. VOSE, JR., Petitioner,

v.

INMATES OF THE SUFFOLK
COUNTY JAIL, et al. Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

George A. Vose, Jr., Commissioner of Correction of Massachusetts, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2a) is unreported.^{1/} The memorandum and order of the District Court (App. 5a-14a) was reported at 734 F.Supp. 561 (D.Mass. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1990. App. 3a-3b. Petitioners invoke the

^{1/} Appendix references are to the Appendix in the Petition of Sheriff Robert C. Rufo.

jurisdiction of this Court under 28
U.S.C. § 1254(1).

STATEMENT OF FACTS
AND PRIOR PROCEEDINGS

This petition seeks review of a district court's denial of a motion to modify a consent decree to allow more than one inmate to reside in certain cells of a new jail for pretrial detainees in Suffolk County, Massachusetts.

Sheriff Rufo, who is also filing a separate petition for certiorari, moved for modification arguing that there had been a change in law and a change in facts because the number of inmates to be housed at the jail had more than doubled since the consent decree was signed. App. 5a. Population predictions contained in the consent decree, on

which the size of the new jail was based, projected that the population would actually decrease during the relevant period. C.A. App. 189.^{2/}

This case began in 1971 as a challenge by inmates of the Suffolk County Jail, also known as the Charles Street Jail, to the conditions of their confinement. Plaintiffs sought relief pursuant to 42 U.S.C. § 1983. Defendants included the sheriff, who operates the jail, M.G.L. c. 127, § 16, and petitioner Commissioner of Correction, who operates state correctional facilities and sets standards for state and county facilities. See M.G.L. c. 124, § 1; c.

^{2/} References to "C.A. App." are to the Court of Appeals' Appendix. See Supreme Court Rule 19.1.

127, §§ 1A, 1B. The trial court, after receiving evidence, found on June 20, 1973, that conditions in the jail were unconstitutional. App. 40a. The trial court made several interim remedial orders, App. 50a - 54a, but found that the unconstitutional conditions could be eliminated only by construction of a new jail. App. 40a.

By a consent decree dated April 9, 1979, the parties, including petitioner Vose's predecessor as Commissioner of Correction, agreed to construct a new jail. The consent decree was six pages in length, but "incorporated" an architectural program of more than 100 pages describing the jail to be built. App. 15a - 22a (not including architectural program). The consent decree stated that its purpose was to "provide, main-

tain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees." App. 15a.

The 1979 consent decree contains no explicit requirement of -- or even reference to -- housing one inmate per cell of the new jail, although the architectural program assumes one inmate per cell. C.A. App. 236. The architectural program also contained projections of the inmate population to the year 2000, compiled by the Peat, Marwick and Mitchell consulting firm. C.A. App. 188-189. These projections stated that the average inmate population would decrease from 245 in 1979 to 215 in the year 2000. Id. As originally designed, the new jail had a capacity for 309 inmates. App. 7a.

Additional litigation concerning the jail took place in 1984 in the Supreme

Judicial Court of Massachusetts. A new jail had not been constructed by this time, and the sheriff was unable to accept certain prisoners because he did not have sufficient space to house them and still abide by the district court's order to house only one inmate per cell in the old jail. See Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985). As a result of the litigation in the state court, special legislation was passed by the Massachusetts legislature in 1985 to pay for construction of the new jail. Mass. St. 1985, c. 799.

Also in 1985, the inmates, with the assent of all other parties, sought the district court's permission for the construction of a larger facility than had first been planned. The inmates' motion,

apparently based on their best estimate of the need for additional cells, sought an increase to 435 cells. C.A. App. 356. The district court approved a larger jail on the "condition" that "single-cell occupancy is maintained" and on other conditions. C.A. App. 354-364; see App. 8a.

The requirement of one inmate in each cell thus was made explicit for the first time only after the consent decree was signed. The one-inmate-per-cell requirement was first contained in the district court's order of April 11, 1985, pursuant to which the district court permitted a larger jail to be constructed. C.A. App. 363-364. As a result of this order, the size of the jail was increased from 309 to 453. C.A. App. 292.

The new jail, also called the Nashua Street Jail, was completed and occupied

in the spring of 1990. The new jail is a "state of the art" facility, conforming to all applicable standards and regulations and containing the latest technology. C.A. App. 295-297. The jail is constructed in modular units, each of which contains 70-square-foot cells, a spacious day room, a kitchenette, a "quiet room," and facilities for visitation and telephoning. Id.

By 1989, however, the sheriff was aware that the Nashua St. Jail would not be sufficiently large to hold all those persons committed to his custody if only one inmate could be held in each cell. The average number of inmates committed to the Sheriff's custody has continued to grow since the size of the new jail was established at 453 cells in

1985. App. 10a-11a; C.A. App. 944-945.^{3/} In 1985, 326 inmates were in the Sheriff's custody on the average day; in 1987, the number rose to 370; by 1989, the number was 408. In three of the 24 months in 1988 and 1989, the average number of inmates committed to the Sheriff's custody was greater than 453. C.A. App. 944.

The sheriff therefore moved to modify the consent decree to allow more than one inmate in 197 of the 453 cells of

^{3/} The record is uncontradicted that, once the 1985 legislation was enacted, additional cells could not have been added without new legislation. C.A. App. 719-721.

the Nashua St. Jail. App. 8a-11a.^{4/}

Although the 1979 consent decree contained no specific term requiring one inmate per cell, the sheriff sought permission to hold two inmates in certain cells by means of a motion to modify the consent decree.

The record is uncontradicted that the reason for this unexpected increase in inmate population is the equally unexpected increase in crime and in the number of arrests in Suffolk County. Both the Boston Police Commissioner and Suffolk County District Attorney filed

^{4/} The proposal to house more than one inmate in only 197 cells allows the facility to continue to meet all of the applicable state and American Correctional Association standards except the standard requiring cells holding two inmates to be at least 140 square feet in size. For example, the Sheriff's proposal complies with the standard for total square footage (including day room, etc.) available to each inmate. C.A. App. 680-709.

affidavits stating that the number of arrests had increased unexpectedly in the relevant period of time, coinciding with an increase in the number of serious crimes. C.A. App. 517-522.

Their affidavits also stated that if inmates who had been committed to the Sheriff's custody had to be released for lack of space, the public safety would be threatened. Id.^{5/} Most of those committed to the Sheriff's custody are charged with serious felonies, such as drug sales and crimes of violence. C.A. App. 722.

After taking evidence, the district court denied the motion to modify the

^{5/} The record describes the elaborate system, established by state court order, for reviewing and releasing inmates when the maximum number is exceeded. App. 10a-11a. The record is uncontradicted that 10% of the inmates who are transferred to halfway houses under this system escape from custody. C.A. App. 298.

consent decree. App. 5a-14a. The United States Court of Appeals for the First Circuit affirmed the district court in an unpublished, four-sentence decision. App. 1a-4a.

**REASONS FOR
GRANTING THE WRIT**

**I. CIRCUITS DISAGREE AS TO THE
STANDARD FOR MODIFICATION
OF CONSENT DECREES GOVERNING
PUBLIC INSTITUTIONS.**

There is wide variance among the circuits in the standard for modification of consent decrees governing public institutions. This case illustrates the need for this Court to enunciate a uniform standard for modification in cases involving public institutions and programs.

A. The Circuits Are Split
 Over The Proper Standard
 For Modification Based on
 Changed Circumstances.

In institutional reform litigation, the First Circuit adheres to the standard for modification established for antitrust consent decrees, first stated in United States v. Swift & Co., 286 U.S. 106, 119 (1932). This standard requires "a clear showing of grievous wrong evoked by new and unforeseen conditions . . ."^{6/} Other circuits, however, have adopted more flexible standards. The best-known statement of this approach in

^{6/} Other circuits have noted the lack of similarity between antitrust cases such as Swift and institutional reform litigation, noting that special factors in institutional litigation limit Swift's relevance. Keith v. Volpe, 784 F.2d 1457, 1460 (9th Cir. 1986); Ruiz v. Lynaugh, 811 F.2d 856, 860-861 (5th Cir. 1987).

cases involving public institutions and programs is probably Chief Judge Friendly's formulation in New York State Assn. for Retarded Children v. Carey, 706 F.2d 956, 969 (2d Cir.), cert. denied 464 U.S. 915 (1983):

[I]n institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

This standard allows modification more readily than the Swift standard because it requires neither "grievous wrong" nor "unforeseen conditions." Several other circuits have applied similar standards in cases involving the modification of consent decrees in institutional litigation. See, e.g., Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114 (3d Cir. 1979) cert. denied 444

U.S. 1026 (1980); Ruiz v. Lynaugh; United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981)(en banc) (vacating district court's denial of modification); Keith v. Volpe; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984) (vacating district court's denial of modification). These courts explicitly have limited the application of Swift in cases involving public institutions. Swift's "standard is inappropriate in institutional reform litigation for 'the unique nature and demands of institutional reform litigation necessitate a more flexible approach to modification.'" Plyler v. Evatt, 846 F.2d 208 (4th Cir.), cert. denied 488 U.S. 897 (1988), quoting Ruiz, 811 F.2d at 861. See also Newman, 740 F.2d at 1520 (citing Swift as one among five standards for modification).

As generally applied by the courts that have adopted the standard for public institutions, modification is appropriate when a term of the original consent decree no longer functions equitably or efficiently because of a change in circumstances, the modification furthers the underlying purpose of the original decree, Heath v. DeCourcey, 888 F.2d 1105 (6th Cir. 1989), the party seeking modification has acted in good faith, Shapp, 602 F.2d at 970-971, and the public interest is served, Duran v. Elrod, 760 F.2d 756, 759 (7th Cir. 1985). This standard preserves the essence of the original consent decree, while adopting it to changed circumstances, new demands on public officials and public resources, and to the public interest. This standard relates directly to the

circumstances of public cases, which are different than in cases involving only private parties. See Ruiz, 811 F.2d at 860-861; Keith, 784 F.2d at 1460.

In cases factually similar to this one, two other circuits have modified consent decrees to dispense with requirements that inmates be held one-per-cell. When unexpected increases in inmate populations made it impossible for prison administrators to obey a consent decree requiring one inmate per cell, the Fourth Circuit vacated the district court's denial of modification of a consent decree and remanded with instructions to modify the consent decree to allow two inmates in some cells. Plyler. In similar circumstances, the Seventh Circuit reversed the district court and temporarily modified a consent decree

requiring one inmate per cell, finding that enforcing the requirement would have an impact on public safety, because dangerous pretrial detainees would have to be released to satisfy the one-inmate-per-cell requirement. Duran.^{7/}

B. The Circuits Are Split
Over The Proper Standard
Of Modification Based on
Change of Law.

The First Circuit's standard for modification based on change of law is stricter than other circuits'

^{7/} In the most-cited case upholding the denial of modification to allow more than one inmate per cell, Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988), the lower court provided reasons why higher inmate populations were not unanticipated. In this case, in contrast, the district court merely concluded, without citation to any evidence and without reference to the population projections in the consent decree, that inmate population increases could have been foreseen.

standards. The First Circuit requires that a later case must "directly overrule" prior law in order to justify modification of a consent decree. App. 10a, citing Coalition of Black Leadership v. Cianci, 570 F.2d 12, 16 (1st Cir. 1978). In contrast, other Courts of Appeal have held that there need be no explicit overruling, and that changes in underlying decisional law constitute a basis for modification of consent decrees. Newman, 740 F.2d at 1520-1521; Nelson v. Collins, 659 F.2d 420, 425-429 (4th Cir. 1981) (en banc).

In this case, the sheriff and petitioner Vose argued that changes in the law after the consent decree was signed justified modification. In the period after the parties signed the consent decrees, this Court ruled several times in

cases involving challenges to the constitutionality of conditions of confinement, changing and clarifying existing law. See, e.g., Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

The district court found that these decisions did not constitute a change in law sufficient to justify modification. The Eleventh and Fourth Circuits, by contrast, found that exactly these cases constitute a sufficient change in law to support modification of consent decrees in similar situations. Newman v. Graddick, 740 F.2d at 1521; Nelson v. Collins, 659 F.2d at 424-429. In both Newman and Nelson, Courts of Appeal vacated district courts' denials of modifications and remanded with instructions to modify the consent decrees to conform to the changed law.

**II. THE COURT SHOULD GRANT THE
PETITION BECAUSE OF THE
NATIONAL IMPORTANCE OF THE
PUBLIC ISSUES IMPLICATED IN
MODIFYING FEDERAL CONSENT DECREES.**

This Court should articulate the rule governing the modification of consent decrees pertaining to public institutions because of the great importance of these consent decrees and the frequency with which questions about modifications arise. In recent decades, litigation about jails and prisons, mental health facilities, welfare and social programs and the like has increased. These cases often result in consent decrees.

Especially in cases involving public facilities and programs, it is important to provide flexibility to account for changed circumstances. The district court's chief reason for denying modification, that the inmates ought to

have the benefit of their bargain, carries far less weight in a case involving a public institution such as a jail; the interests on the other side, including public officials' duty to act, competing demands on scarce public resources, and public safety interests, strongly weigh on the side of flexibility. See Duran, 760 F.2d at 759; Jost, From Swift to Stotts and Beyond: Modifications of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1149 (1986); Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L. Rev. 1020, 1032-1039 (1986).

If the First Circuit's rigid standard for modification is undisturbed, consent decrees involving public institutions will become virtually ironclad arrangements with the status of law,

whatever may be the contrary wishes of later elected executive officials or legislators. Such consent decrees may be "a shortcut around political constraints." Note, Federalism and Federal Consent Decrees Against State Government Entities, 88 Col. L. Rev. 1796, 1806 (1988). See also Rabkin and Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 269-276 (1987); Note, 99 Harv. L. Rev. 1024, 1035. These considerations motivated the Justice Department's strict controls on consent decrees that bind and constrain later executive and legislative officials. See Jost, The Attorney General's Policy on Consent Decrees and

Settlement Agreements, 39 Admin. L. Rev. 101 (1987).

Because so many cases involving governmental institutions and programs are resolved by consent decrees which are permanent or long-lived, questions of modification of the decrees will continue to proliferate. See cases cited at Jost, 64 Tex. L. Rev. 1101; Note, 99 Harv. L. Rev. 1020 and Note, 88 Col. L. Rev. 1796 (1988). The only decisions of this Court addressing modifications of consent decrees involve quite different circumstances, because they arise from cases involving antitrust consent decrees in which very different interests are at stake and different pressures affect the litigation. See Ruiz, 811 F.2d at 860-861. In order for governments to understand the risks and obligations

they face when they enter into consent decrees, this Court should state a uniform, flexible standard governing modification of consent decrees in cases of public institutions and programs.

III. **THE CIRCUITS ARE DIVIDED
ON THE QUESTION OF DISTRICT
COURTS' POWERS TO ENFORCE
CONSENT DECREES ABSENT
CONSTITUTIONAL VIOLATIONS.**

This case also presents the important and recurring question of a federal court's power to enforce a consent decree absent any constitutional violation warranting the remedy. This Court should hold that federal courts have no such power when, as in this case, there is no continuing or threatened violation of a federal right.

In this case, the district court has ordered, purportedly based on the consent decree, state officials to hold

no more than one inmate in each cell of the new jail, even though it now is clear that inmates have no constitutional right to live one-per-cell. Rhodes v. Chapman; Bell v. Wolfish.^{8/} The district court held that the consent decree vested it with the power to enforce the one-inmate-per-cell rule, even though the rule is not constitutionally required.^{9/}

^{8/} Since the consent decree was signed in 1979, the law regarding federal courts' power also has been clarified substantially. See, e.g., Pennhurst State School and Hosp. v Halderman, 465 U.S. 89 (1984). It is unlikely that the defendants would have entered into the consent decree in this case had Pennhurst and similar cases been decided at the time.

^{9/} The district court's decision effectively means that all pretrial detainees in Suffolk County must be held one per cell in perpetuity.

Other Courts of Appeal have held that federal courts may not enforce consent decrees that go beyond the relief that the courts could award after trial. "[A] federal court's remedial jurisdiction is coextensive with and no greater than the scope of the right being protected." Lelsz v. Kavanagh, 807 F.2d 1243, 1253 n. 11 (5th Cir.), cert. dis. 483 U.S. 1057 (1987) (holding that federal court was without jurisdiction to enforce consent decree). In Washington v. Penwell, 700 F.2d 570, 574-575 (9th Cir. 1983), the court refused to enforce a consent decree that went beyond the court's inherent powers. In Newman v. Graddick and Nelson v. Collins, as well, courts modified consent decrees to make them coextensive with the court's remedial powers.

Federal courts may act only when there is a violation of a constitutional right or federal law. A remedy under a consent decree should be within the bounds of the underlying federal right. Firefighters Local Union v. Stotts, 467 U.S. 561, 574 (1984); see Note, 88 Col. L. Rev. 1796, 1804 (1988). The Eleventh Amendment bars federal courts from requiring the sheriff, whose office is established by the Massachusetts Constitution, to provide inmates with more than the constitution requires. Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976). Although a federal court may enter a consent decree providing more relief than the court could give after trial, Local No. 93 v. City of Cleveland, 478 U.S. 501, 525 (1986), this Court has not held that a lower court has the power

to enforce against a state the provisions of such a decree that go beyond constitutional requirements.^{10/}

With regard to this question as well, states and private parties involved in litigation over state institutions and programs must know the limits of federal courts' authority. To bring certainty and predictability to the law of consent decrees, this Court should decide the limits of federal courts' authority to enforce consent decrees when the consent decrees go beyond what is required by the constitution or federal laws.

^{10/} This Court frequently has pointed out the importance of federal courts' deference to executive branch officials in the context of prison administration. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 585 (1984).

IV. UNDER THE PROPER STANDARD,
THE LOWER COURTS' ORDERS
COULD NOT STAND.

The lower courts' orders contain several errors and should be reversed. If the lower courts had appropriately applied the flexible standard discussed in Parts I and II above, they would have allowed the modification.

A. The Judgment Requires Class Members
To Be Held in Poorer Facilities.

The lower courts' decisions perversely require some inmates to be transferred to poorer facilities where they are held two-per-cell, rather than allowing them to be held two-per-cell in the more modern and up-to-date Nashua St. Jail. C.A. App. 297. There is no showing in the record that the members of the class prefer this outcome, which appears to be contrary to their best interests.

The record below was clear that, if modification was not allowed, many inmates committed to the custody of the sheriff could not be held in the Nashua St. Jail and would have to be sent to other facilities. C.A. App. 721-722. These transfers are necessary because too many inmates are committed to the sheriff's custody to be held one-per-cell at the Nashua St. Jail.^{11/}

The order in this case requires the sheriff to keep only one inmate per cell at the Nashua St. Jail, although most other correctional facilities in the Commonwealth are under no such orders, so that only a

^{11/} This case is of particular practical concern to this petitioner, the Commissioner of Correction, because many overflow inmates from the Suffolk County Jail are transferred pursuant to M.G.L. c. 276, § 52A, to state institutions under his control that already hold inmates in excess of their capacity.

few facilities in the Commonwealth are required to comply with the stringent standards placed upon the sheriff. C.A. App. 423-488. The record is clear that those inmates transferred to other facilities are nearly always held two-per-cell, occasionally three-per-cell, in facilities that are uniformly older and contain smaller cells and fewer amenities than the Nashua St. Jail. Id. All of those transferred are held outside Suffolk County, presumably further from their families and attorneys. Some are held more than 100 miles from Boston.

If the lower courts had correctly applied the flexible standard for modification, they would have taken into account the impact of the order on these class members and should have allowed the motion to modify. By allowing the modification, the courts would have

permitted the sheriff to hold these inmates two-per-cell at the newer, more desirable Nashua St. Jail and would have obviated the need for the sheriff to spend nearly \$1 million annually to transport and house the inmates in other facilities. C.A. App. 723-724.

B. The Lower Courts' Decisions
Undermine Public Safety.

Because the lower courts' orders lead to the release of inmates who have been found by competent courts to be at risk of flight, M.G.L. c. 276, § 58, they undermine public safety. See also C.A. App. 517-522.

There is no dispute that the lower courts' orders have led to the regular release of inmates who have been determined to be at risk of flight to halfway-house programs from which ten percent escape. C.A. App. 298. The

record is uncontradicted that they are a threat to public safety if released. The lower courts' actions continue to leave open the door for the direct release of persons committed to the sheriff's custody when there is no room at the jail and when the sheriff is unable to effectuate or afford transfers to other facilities or to halfway houses.

The lower courts' orders also should be reversed because they fail to adequately protect public safety. See Duran v. Elrod, 760 F.2d at 760-761.

C. This Case Shows the Need
For a Flexible Standard.

This case illustrates the need for this Court to set forth a flexible standard of modification and the difficulties with the rigid approach

applied by the Court of Appeals below. Grounds for modification exist because the parties' agreed projections of inmate population, contained in the consent decree itself, proved very optimistic. While the consent decree projected that the average number of inmates would fall from 245 in 1979 to 215 in 1999, in fact the current number now exceeds 500. The record is uncontradicted that this increase is caused by an increase in crime, which the parties could not have predicted. There is no reason that the sheriff and the public should bear the entire burden of this mistake; rather, the consent decree should be modified.

Applying a flexible standard for modification, which would permit the weighing of these burdens in light of

growing inmate population, would result in modification in this case.^{12/} There appears to be no question that the inmates would continue to reside in constitutionally-sufficient accommodations if the modification sought by the sheriff is granted.

^{12/} This argument is similar to the argument of the United States in Board of Education of Oklahoma City v. Dowell, No. 89-1080.

CONCLUSION

For the reasons stated in this petition, this Court should grant the petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

JAMES M. SHANNON
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

Douglas H. Wilkins*
Jon Laramore
Assistant Attorney General
One Ashburton Place,
Room 2019
Boston, Massachusetts 02108
617-727-2200

DATED: December 19, 1990

*Counsel of Record
2330B



(2) (2)
Nos. 90-954; 90-1004

Supreme Court, U.S.
FILED

JAN 18 1991

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.

Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.
Respondents.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION, ET AL.

Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.
Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Max D. Stern
Counsel of Record
Lynn Weissberg
Stern & Shapiro
80 Boylston Street
Suite 910
Boston, MA 02116
(617) 542-0663
Counsel for Respondents

Of Counsel:
Alan B. Morrison



QUESTIONS PRESENTED

Should this Court grant review to resolve an alleged conflict in the circuits over the proper standard for modifying a consent decree, when petitioners' principal objection here is that the lower courts improperly applied their preferred legal standard to the facts of this case?

May a local official be relieved of an obligation to which he consented to settle a complicated civil rights action, on the ground that the obligation is not required by the Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITIONS . . .	13
I. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE STANDARD WHICH SHOULD GOVERN MODIFICATION OF CONSENT DECREES.	13
A. The Court of Appeals' Decision Was Not In Conflict With The Decisions Of Any Other Circuit Court Or of This Court.	15
B. Proper Application of The "Flexible Standard" Does Not Mandate Modification Of The Decree.	17
II. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE QUESTION OF WHETHER A LOCAL OFFICIAL MAY COLLATERALLY ATTACK A DECREE TO WHICH HE CONSENTED ON THE GROUND THAT THE RELIEF WAS NOT LEGALLY REQUIRED.	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases

Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E. 2d 361 (1985)	7
Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988)	17, 19
Bd. of Educ. of Oklahoma City v. Dowell, No. 89-1080, (U.S. January 5, 1991)	13-16, 19
Bell v. Wolfish, 441 U.S. 520 (1979) .	10, 12, 20, 22, 26
Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257 (1978)	17
Equal Employment Opportunity Commission v. Mike Smith Pontiac GMC, Inc., 869 F.2d 524 ² (11th Cir. 1990)	18
Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978) . . .	20
Fortin v. Comm'r. of Mass. Dept. of Public Welfare, 692 F.2d 790 (1st Cir. 1982)	15
Harris v. Martin, 834 F.2d 361 (3rd Cir. 1987)	17
In re Champion, 895 F.2d 490 (8th Cir. 1990)	18
Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1973)	2, 8

Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978)	4, 27
L.A. Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696 (10th Cir. 1989)	18
Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir.), <u>cert. dis.</u> 483 U.S. 1057 (1987)	28
Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986)	27
Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980)	17
Mass. Ass'n of Older Americans v. Comm'r. of Public Welfare, 803 F.2d 35 (1st Cir. 1986)	15, 16
Melear v. Spears, 862 F.2d 1177 (5th Cir. 1989)	17
Montana v. United States, 440 U.S. 147 (1979)	27
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977)	28
National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762 (9th Cir. 1989)	18
New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.), <u>cert. denied</u> , 464 U.S. 915 (1983)	16
Rhodes v. Chapman, 452 U.S. 337 (1981)	26

Richardson v. Sheriff of Middlesex County, 407 Mass. 455 (1990)	24
Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987)	17
Sieck v. Russo, 869 F.2d 131 (2nd Cir. 1989)	17
Smith v. Secretary of Health and Human Services, 776 F.2d 1330 (6th Cir. 1985)	17
Transportation, Inc. v. Mayflower Services, 769 F.2d 952 (4th Cir. 1985)	17
Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988)	16, 17
United States v. Commonwealth of Massachusetts, 809 F.2d 507 (1st Cir. 1989)	15
United States v. Western Elec. Co., 894 F.2d 430, 434-35 (D.C. Cir. 1990)	17
United States v. Armour & Co., 402 U.S. 673 (1971)	20
United States v. Swift & Co., 286 U.S. 106 (1932)	12, 15
United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968)	19
Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983)	28
Williams v. Hatcher, 890 F.2d 993 (7th Cir. 1989)	18

Statutes and Regulations

M.G.L. c.34, §3 1

M.G.L. c.124, §1 1

M.G.L. c. 127, §1 1, 28

M.G.L. c.127, §1A 1

M.G.L. c.127, §1B 1

M.G.L. c.276 §52A 8

103 C.M.R. §450.321 22

103 C.M.R. §972.03(2) 22

1985 Mass. Acts c.799 §8 24

1986 Mass. Acts c.658 §1 24

1986 Mass. Acts c.658 §5 24

Other Authorities

Jost, From Swift to Stoots and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986) 21



STATEMENT OF THE CASE

A. Introduction

This lawsuit was commenced in 1971 on behalf of the class of inmates of the Suffolk County Jail, a county facility for pre-trial detainees then known as the "Charles Street Jail."^{1/} Defendants were the Sheriff of Suffolk County, who operates the jail, M.G.L. c. 127, §16, the Mayor and City Councilors of the City of Boston, who constitute the Suffolk County Commissioners and who have the duty to provide a "suitable jail," M.G.L. c.34, §3, and the Massachusetts Commissioner of Correction, who operates state institutions and who sets standards for county facilities. M.G.L. c.124, §1; c.127, §§1A, 1B.

The two petitions in this case would lead the Court to believe that the consent decree which the Sheriff sought to modify was the product of his willingness to settle a disputed litigation by giving far more than was legally

^{1/} The class was certified on June 29, 1971. (C.A. App. 9).

References are as follows:

Petitioner's Appendix	Pet. App.
Respondents Appendix	Resp. App.
Appendix for First Circuit Court of Appeals	C.A. App.
Sheriff's Petition for Writ of Certiorari	Sher. Pet.
Commissioner of Correction's Petition for Writ of Certiorari	Comm. Pet.

required and that the district court later arbitrarily refused to apply the proper legal standard and also misapplied that standard to the facts of this case. The petitions further suggest that review is warranted in this case to resolve an alleged conflict among the circuits over the proper legal test to be used in deciding whether a consent decree is to be modified. Because none of those propositions accurately reflects the record below, it is necessary to review the proceedings in some detail. Such a review more than amply demonstrates that, even if there were a conflict among the circuits, which we doubt, this case does not present a proper vehicle for resolving it because the district court found against petitioners on the very standard that they ask this Court to adopt. Moreover, the record fully supports the refusal of the district court to eliminate the one prisoner per cell standard in the consent decree because it was the central element of the relief that the plaintiff class sought throughout this case.

B. Proceedings Leading to the Consent Decree

In its initial Opinion and Order of June 23, 1973, the district court held that the conditions at the Suffolk County Jail violated the detainees' rights to due process of law under the Fourteenth Amendment to the United States Constitution. Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1973). (Pet. App. 23a). The court reviewed the unhealthy, inhumane and dangerous conditions of confinement, Pet. App. 25a-35a, and concluded that the jail must be replaced. (Pet. App. 45a). One of the most important aspects of confinement was the then-prevailing practice of double-celling:

Cell size is approximately 8' wide x 11'

long x 10' high, and was designed and constructed for single occupancy. . . . It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions.

. . .

On July 12, 1972 an inmate was beaten to death by his cellmate, who had beaten a previous cellmate in May 1971. Despite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy of cells

(Pet. App. 26a-27a, 27a, n.4). The court concluded that this practice violated the constitutional rights of the pre-trial detainees at the jail:

Briefly, an inmate at Charles Street who merely stands accused spends from two months to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cell-mate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away.

(Pet. App. at 42a). Accordingly, as the first element of the interim relief, the court permanently enjoined the defendants "from housing at the Charles Street Jail after

November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial." (Pet. App. 48a). The court also enjoined the defendants from holding any detainees at the jail after June 30, 1976. (Pet. App. 48a). No appeal was taken by the defendants.

In 1977, after virtually no progress had been made on producing a plan for a replacement facility, the district court set a firm date for the closing of the jail. On appeal, the First Circuit affirmed, noting that "[i]t is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under conditions repugnant to the constitution." Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978). However, as a result of an offer by plaintiffs' counsel, the court also provided that the closing would be further extended if there were an enforceable commitment by defendants to construct a new facility according to a design and plan to be approved by the district court. Specifically, the defendants would have to submit "a plan for a new facility including commitments for adequate funding, agreement on a site, projected target dates for the beginning and completion of construction, and an architectural design or written description of the conditions of confinement within the new facility consistent with constitutional standards." Id. at 101. If no such plan was submitted and approved prior to October 2, 1978, the jail was to close on that date. Id. at 100-101.

The defendants filed a plan on September 28, 1978, which became the basis for the "consent decree" that is now before this Court. Plaintiffs supported the plan, and it was approved by the district court on October 2, 1978. As a result, the old jail was permitted to remain in use

until completion of the new facility. In approving the plan, the district court emphasized that it provided for single cell occupancy in the new facility:

the critical features of confinement, such as single cells of 80 sq. ft. for inmates are fixed, and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions are included.

(Memorandum and Orders as to Pretrial Detention, October 2, 1978) (emphasis added). (Resp. App. 3a). The order recognized that a final, more detailed architectural program would be prepared, but noted that "there are unequivocal commitments to conditions of confinement which will meet constitutional standards." Id. (emphasis added). The court ordered the defendants not to deviate from the plan "in any substantial way" without court approval and "without delay [to] take all steps to carry [it] out." (Resp. App. 4a).

Thereafter, an architectural program was negotiated with the plaintiff class which established the standards for the new jail. The program was consistent with the previously approved plan, and it provided for single occupancy cells for both male and female detainees. On May 7, 1979, the district court approved the program which was directly embodied in a consent decree. Like the prior court orders and the prior plan, it specifically provided for single cell occupancy. (C.A. App. 237, 242).

In its preamble, the decree noted the desire of all

parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" and that the attached and incorporated architectural program "sets forth a program which is both constitutionally adequate and constitutionally required." (Pet. App. 16a). The preamble also included the recognition by the parties of the mutual trade-offs involved: the defendants would be allowed to use the existing facility until a new one was constructed, and the plaintiffs would obtain specific minimum criteria for incarceration of future generations of inmates. (Pet. App. 15a-16a). The decree further provided that defendants could not "change or depart from [the architectural program] in any substantial way except with the assent of the parties or the approval of the Court." (Pet. App. 21a). The new jail was to be completed by 1983.

C. Subsequent Proceedings Relevant to the Consent Decree

Judge Keeton took over the case shortly after the decree was approved.

The detainee population increased steadily after entry of the decree. (Pet. App. 10a); see C.A. App. 649, 651, 380, 944. The initial planned capacity of the new jail was 309. However, by November, 1982 the Sheriff notified the parties that a larger facility would be required. (C.A. App. 642). In October of 1984, litigation was commenced before a Single Justice of the Massachusetts Supreme Judicial Court which came to focus on the adequacy of the planned capacity of the new jail. The plaintiffs were intervenors in this action. The Sheriff argued that the planned capacity of 309 was insufficient and proposed that

the Single Justice order, pursuant to state law, various other county defendants to provide him with a jail of 435 cells in order to house a detainee population of that same number. The Single Justice ordered that the larger jail be built, and this order was affirmed by the full bench. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E. 2d 361 (1985).

Subsequently, the district court approved a modification of the consent decree to allow the defendants to increase the capacity of the new jail, provided, however, that "single-cell occupancy is maintained under the design for the facility." Order, April 11, 1985 (emphasis added) (Resp. App. 6a).^{2/} Petitioners assented to this order.

As the design phase proceeded, the population continued to rise. The district court found that there was a "marked upward trend in the number of inmates held in the Sheriff's custody since 1985." (Pet. App. 11a). In fact, it was apparent by 1985 that the population exceeded the planned number of regular male housing cells.^{3/}

Despite the increase in commitments, the Sheriff was always able to comply with the single cell injunction

^{2/} The district court's order did not provide for a specific number of cells, but instead required that "the relative proportion of cell space to support services will remain the same as it was in the Architectural Program." (Resp. App. 6a-7a).

^{3/} The yearly average for 1985 was 326. (C.A. App. 380); however, the number of cells allocated for regular male housing in the new jail at that time was 282. (C.A. App. 293).

which, at the Charles Street Jail, entailed a population limit of 342. This was accomplished through a number of measures, including the transfer to state prisons of pre-trial detainees who previously served felony sentences in state correctional institutions, pursuant to M.G.L. c.276 §52A, Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974), Superior Court bail reviews conducted by the Bail Appeal Project, Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975), and special Superior Court sessions pursuant to an order of the Single Justice, in which bail orders were compared and reviewed on a county-wide basis, selecting suitable detainees for transfer to halfway house or release on personal recognizance. (C.A. App. 389).

During this period, the Sheriff made no motion to modify the decree. No party suggested that a new design should be considered. Instead, planning continued under the single occupancy model, and ultimately, the facility was constructed on that design. According to the Sheriff's affidavit, filed in the district court, he "chose" the "certainty of a new facility" and decided not to seek a change in its design because that would have involved, in his view, "further delay and additional expense to the public." (C.A. App. 720).

Ground breaking for the new Suffolk County Jail took place on Nashua Street in Boston in September of 1987. The foundation was completed by the Spring of 1988, and construction was completed in the Spring of 1990. The

detainees were moved to the jail in late May, 1990.^{4/}

The total male capacity at the new jail is 413. (C.A. App. 943, 945). This constitutes an increase of 71 cells over the previous male capacity at the Charles Street Jail, which was 342. Id. The regular housing cells are designed in modular units. (C.A. App. 365). Each unit contains two tiers of cells with an adjacent dayroom, showers, visiting rooms, quiet rooms, and recreational facilities. The cells are 70 square feet, with approximately 40 square feet of available floor space. The cells have doors, not bars, with a narrow window. (C.A. App. 605). The door was designed to maximize the detainee's privacy when locked in the cell. The window provides a wide field of vision from the outside only if the observer is immediately adjacent to the door. Each cell has a toilet and sink unit which is placed near the door at an angle so that the detainee cannot be observed while using the toilet. From the control room, where the officers are stationed, it is possible to maintain observation only of the dayroom area outside the cells. (C.A. App. 614, 618-22).

D. The Proceedings Below

On July 17, 1989, when the construction of the jail was nearing completion, and after it was no longer possible to change the design of the building, the Sheriff moved the district court for modification of the consent decree, pursuant to Fed.R.Civ.P. 60 (b)(5) or (6), to allow the double bunking of male detainees in 197 of the jail's

^{4/} When the site was changed to Nashua Street, the jail was redesigned by the state agency responsible for the construction, and the number of cells was increased from 435 to 453.

316 regular male housing cells. The maximum capacity under the Sheriff's proposal would be 650, representing a 43.5% increase over the planned capacity of 453.^{2/}

In the district court, the Sheriff argued that there were certain changes in the law and the facts which required modification of the Decree. The changed circumstances cited by the Sheriff were (1) an asserted change in the law, effected by the Supreme Court decision in Bell v. Wolfish, 441 U.S. 520 (1979), which was decided one week after the Consent Decree was approved by the district court, and (2) an asserted change in operative fact, to wit, increases in the Suffolk County pretrial male detainee population.

The Sheriff proposed adding a second, bunk-style bed on top of the existing bed in 197 cells that were designed for single occupancy. Those detainees who would be double bunked would be cut of their cells for 12 hours per day and locked in their cells for 12 hours per day.

The Commissioner of Correction took no position on the Sheriff's motion -- filing no papers and making no oral argument.

Plaintiffs opposed the motion. The court received evidence in the form of affidavits. Plaintiffs introduced evidence demonstrating that the cells were specially designed to maximize privacy for a single occupant and that, as a result, double bunking in these cells would present a serious risk to the safety of the detainees.

^{2/} Under the Sheriff's plan, the male capacity would be 610 (C.A. App. 943, 945), and the female capacity would be 40 (C.A. App. 294).

Multiple occupancy would inevitably increase tensions and increase the likelihood of violent behavior between detainees. (C.A. App. 626-28, 881-84). According to the evidence, it would be extremely difficult to observe or hear altercations between two detainees in a cell because of the layout and design of the cells, the design of the cell door, and the location of the control room. (C.A. App. 614, 618-22).

Plaintiffs also submitted an architectural analysis which demonstrated that increasing the capacity by adding 197 detainees would make it impossible to comply with the district court's order to maintain "the relative proportion of cell space to support services" as required by the architectural program.^{6/} Order, April 11, 1985 (Resp. App. 6a-7a).

Plaintiffs' architectural expert also addressed the question of when the design of the jail could have been changed to accommodate a larger capacity. The uncontradicted evidence was that changes could have been made at any point prior to April 1988, when the foundation was completed. (C.A. App. 616-17).

The district court judge took a view of the Nashua Street Jail on March 9, 1990 and made a close inspection

^{6/} The expert found that numerous standards contained in the architectural program would be violated by the Sheriff's proposal. (The architectural program incorporates the American Correctional Association standards, but in certain respects exceeds those standards.) Most importantly, the standard for single occupancy cells of 70 sq. ft. would not be met. (C.A. App. 602).

of the entire facility. (C.A. App. 69).

After hearing, the district court denied the Sheriff's motion for modification of the Decree. (Pet. App. 13a). The court found it unnecessary to decide whether double celling in the new facility would be unconstitutional (Pet. App. 12a), since it concluded that modification was not warranted in any event.

First, the court considered whether the Sheriff had met the test for modification set forth in United States v. Swift & Co., 286 U.S. 106, 119 (1932). Applying this standard, the court found no basis for relief since the circumstances advanced by the Sheriff were neither new nor unforeseen. The court found that Bell v. Wolfish "did not directly overrule any legal interpretation on which the 1979 consent decree was based." (Pet. App. 10a). Rather, the court held that the consent decree constituted "an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination on the issue of constitutionality." (Pet. App. 13a). The court also found that the Suffolk County pretrial detainee population had been increasing since the entry of the decree, that there had been a "marked upward trend in the number of inmates held in the Sheriff's custody since 1985" and therefore, the increase in population was neither new nor unforeseen. (Pet. App. 11a).

Next, the court considered whether the Sheriff had presented sufficient grounds for modification under the "flexible" standard advocated by him. Applying this standard, the court still concluded that "modification would not be appropriate." (Pet. App. 12a). Specifically the court found that:

[t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element. Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential. The type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree.

(Pet. App. 12a).

The Sheriff and the Commissioner of Correction appealed. The First Circuit, in a per curiam opinion, affirmed, stating "we are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." (Pet. App. 2a).

REASONS FOR DENYING THE PETITIONS

I. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE STANDARD WHICH SHOULD GOVERN MODIFICATION OF CONSENT DECREES.

In Bd. of Educ. of Oklahoma City v. Dowell, No. 89-1080 (U.S., January 5, 1991)(Westlaw, S.Ct. file) this

Court held that "[n]o additional showing of 'grievous wrong evoked by new and unforeseen conditions' was required on a school board's motion to vacate a decree to which they had not consented, where 'the purposes of the desegregation litigation had been fully achieved.'" Id. at 15. Oklahoma City did not itself concern the question of what standard to apply to modification of a decree where the provision in question had been specifically negotiated and agreed upon since the order there was court imposed. Id. at 5. Oklahoma City was also specifically limited to school desegregation cases, which have special needs and which, the Court observed, "are not intended to operate in perpetuity," as is the decree here. Id. at 16.

Petitioners rely on various circuit court cases which apply a similar standard, which they refer to as the "flexible" standard, to consent decrees. They argue that certiorari should be granted to resolve what they contend is a conflict in the circuits as to whether this standard should be applied to consent decrees. In addition, although he took no position on this issue in the district court, petitioner Commissioner also argues that certiorari should be granted because of the "national importance" of the question. (Comm. Pet. at 22).

However, the barest examination of the record in the case reveals that the decision below does not actually conflict with any case cited by petitioners, that it is fully consistent with this Court's recent decision in Oklahoma City, and that the question purportedly presented is not even posed. Indeed, the only issue which is truly raised by the case is the entirely conventional one of whether a district judge abused his powers in a decision clearly committed to his discretion.

A. The Court of Appeals' Decision Was Not In Conflict With The Decisions Of Any Other Circuit Court Or of This Court.

Both petitions obscure the fact that the particular decision under review does not conflict with any other court of appeals decision cited by the petitioners because it rests on an alternative ground on which there is no arguable conflict. For similar reasons, there is no arguable conflict with the decision in Oklahoma City. The holding of the district court was that the motion for modification should be denied under either the Swift grievous wrong/unforeseen conditions standard or the "flexible" standard. The court of appeals affirmed in a two paragraph per curiam opinion which simply noted that the court was "in agreement with the well-reasoned opinion of the district court" that "circumstances had not changed sufficiently to justify modification of the consent decree." (Pet. App. 2a). What standard the First Circuit would apply to modification of a consent decree if circumstances forced it to choose is not at all clear from the per curiam opinion here. In previous decisions that court has, from time to time, relied on the very cases which petitioners claim are in conflict. See Fortin v. Comm'r. of Mass. Dept. of Public Welfare, 692 F.2d 790, 800 (1st Cir. 1982); Mass. Ass'n of Older Americans v. Comm'r. of Public Welfare, 803 F.2d 35, 38-39 (1st Cir. 1986); U.S. v. Commonwealth of Mass., 809 F.2d 507 (1st Cir. 1989). In the latter case, the court observed:

Recognizing that in public litigation the beneficiaries are commonly third parties, several appellate courts have held that

district courts, which are responsible for overseeing the execution of consent decrees, should have broad discretion in determining whether the objectives of the decree have been substantially achieved. We have stated that "in examining a decree issue in public law litigation . . . the appellate court should recognize that broad 'judicial discretion may well be crucial' for the district judge to secure 'complex legal goals.'"

Massachusetts Ass'n of Older Americans v. Commissioner of Public Welfare, 803 F.2d 35, 38 (1st Cir. 1986) (quoting AMF, *supra*, 711 F.2d at 1101). See also Twelve John Does v. District of Columbia, 861 F.2d 295, 298 (D.C. Cir. 1988); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 970 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983).

Id. at 509-10.

The holding of the court of appeals, accordingly, in no way conflicts with the decisions urged by petitioners. Since the district court held that modification was not warranted under the "flexible" standard, the only legal issue directly posed in this case is whether the appellate court correctly upheld the district court's ruling in this respect. Unless application of the "flexible" standard necessarily mandated modification of the decree, the question of whether the "flexible" standard controls would never arise. But clearly, the flexible standard does not require the relief sought as a matter of law. Courts of appeals, applying a flexible standard, have often upheld --

and even required -- the denial of motions similar to the one at issue here. See Badgley v. Santacroce, 853 F.2d 50, 54-55 (2d Cir. 1988) (reversing modification of consent decree population cap); Twelve John Does v. District of Columbia, 861 F.2d 295, 302 (D.C. Cir. 1988) (upholding denial of modification of consent decree capacity limit); Ruiz v. Lynaugh, 811 F.2d 856, 862-63 (5th Cir. 1987) (upholding refusal to modify "crowding stipulation" which included minimum living space for each inmate). For reasons which follow, the courts below properly applied the "flexible" standard in the facts of this case. Thus, the district court's rejection of the Sheriff's motion under the "flexible" standard means that any possible conflict among the circuits had no bearing on the outcome of this case.

B. Proper Application of The "Flexible Standard" Does Not Mandate Modification Of The Decree.

This Court has previously noted that the standard for appellate review of the decision whether to modify a decree is whether the decision constituted an abuse of discretion. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 263, 263 n.7 (1978). There is no conflict of the circuits on this point.²⁷ There could be no

²⁷ U.S. v. Western Elec. Co., 894 F.2d 430, 434-35 (D.C. Cir. 1990); Manning v. Trustees of Tufts College, 613 F.2d 1200, 1204 (1st Cir. 1980); Sieck v. Russo, 869 F.2d 131, 135 (2nd Cir. 1989); Harris v. Martin, 834 F.2d 361, 364 (3rd Cir. 1987); Transportation, Inc. v. Mayflower Services, 769 F.2d 952, 954 (4th Cir. 1985); Melear v. Spears, 862 F.2d 1177, 1182 (5th Cir. 1989); Smith v. Secretary of Health and Human

other rule. The exigencies of long-term administration of a complicated decree clearly require that the court most familiar with the decree, the history of the litigation, the context, and the local circumstances be accorded a wide latitude. Accordingly, for the Court to reverse the judgment below, it would have to engage in the fact-bound determination of whether, in the light of all of the particular circumstances, in the context in which they arise, and in the light of the unique history of the case, the court of appeals was required to hold that Judge Keeton necessarily abused his discretion in finding that the circumstances did not sufficiently warrant modification. It is for this reason that petitioners acknowledge that any error is in the alleged failure of Judge Keeton to apply the flexible standard properly.^{8/}

Whether the district judge abused his discretion is

Services, 776 F.2d 1330, 1332 (6th Cir. 1985); Williams v. Hatcher, 890 F.2d 993, 995 (7th Cir. 1989); In re Champion, 895 F.2d 490, 492 (8th Cir. 1990); National Union Fire Ins. Co. v. Seafirst Corp., 891 F.2d 762, 765 (9th Cir. 1989); L.A. Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 702 (10th Cir. 1989); Equal Employment Opportunity Commission v. Mike Smith Pontiac GMC, Inc., 869 F.2d 524, 528 (11th Cir. 1990).

^{8/} See Sher. Pet. at 9 ("[T]he court then purported to apply the 'flexible standard'"), 14 ("The court then purportedly went on to apply the flexible standard"), 15 ("[t]he district court applied that element in a manner that is completely inconsistent with the manner that the other circuits have applied it.") and Comm. Pet. at 31 ("[I]f the lower courts had appropriately applied the flexible standard"), 33 ("[i]f the lower courts had correctly applied the flexible standard")

hardly a question worthy of certiorari. In any event, Judge Keeton was clearly correct here.

First, even under the petitioners' formulation of the standard, modification should be denied if it is inconsistent with a principal purpose of the decree. (Comm. Pet. at 17.) This fundamental point was reaffirmed by Oklahoma City. "[A decree] may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." Id. at 15 (quoting United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968). See, e.g., Badgley v. Santacrose, 853 F.2d 50, 53 (2d Cir. 1988) (denying modification of population cap under flexible standard).

The requirement of single cell occupancy was a central objective and focus of this lawsuit from the very outset. The single occupancy provision was a vital component of the decree; according to the district court at the time, it was a "critical" feature. As Judge Keeton found, "[t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element." (Pet. App. 12a).

Where a consent decree is in issue, a court must look at what the parties agreed upon, as embodied in the decree itself, to determine whether the purposes of the lawsuit have been achieved.

Consent decrees are entered into by parties to a

case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

In this case, the decree was specifically negotiated in the knowledge that the constitutionality of multiple occupancy was actually sub judice in this Court, see, Bell v. Wolfish, 441 U.S. 520 (1979), and was an open question in the First Circuit as well. See, Feeley v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978). Indeed, the entire point of the decree was to agree upon the standards to be observed in the new facility without further litigation. As the district court observed, "[i]t was an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination of the issue of

constitutionality." (Pet. App. 13a). Moreover, the plaintiffs made substantial concessions on other points in order to achieve this agreement. The parties agreed to reduce the space per cell from 80 to 70 sq. feet. (C.A. App. 237, 242). Most importantly, the plaintiffs agreed to a further delay in closing the old jail -- a delay which ultimately lasted for eleven years.^{2/}

In these circumstances it would be intolerable to permit a party to renege because, in retrospect, he now prefers the result he might have achieved had he litigated. Indeed, the commentator upon whom the petitioners most rely for the appropriateness of a "flexible" standard, holds that, even under that standard, modification of the decree should be denied in the exact circumstances presented here, for this reason alone. Jost, From Swift to Stoots and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1135-36 (1986).

Second, in the ten years since the consent decree was entered, the single cell occupancy requirement has been relied upon by all parties to such an extent that modification now would cause especially serious harm to the plaintiff class. Single occupancy was the crux of the design of the new facility. Numerous other design features were based upon that assumption. Most importantly, the architects utilized this feature to develop a unique plan to insure privacy for the detainees. Unlike the plan of virtually every other jail in the United States, the plan here

^{2/} "Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential." (Pet. App. 12a).

-- involving the configuration of the individual cells, the design of the cell doors and windows and the layout of the cells within the housing units -- was to minimize visual observation of the interior of the cell and thus to maximize privacy. The indispensable premise of this design was that use of each cell was to be by no more than one detainee. Similarly, the cell size was set at half the Massachusetts minimum for double occupancy. 103 C.M.R. §§450.321; 972.03(2). Indeed, relying upon the single occupancy guarantee, plaintiffs agreed to a reduction of the 80 square foot design contained in the original plan. Obviously, placing two detainees in this type of cell would create dangers not even present in the old facility. The result of utilizing this unique single occupancy design for double occupancy would convert the very reforms promised by the decree into instruments which threaten the safety and destroy the privacy of the inmates. Moreover, under the Sheriff's double bunking proposal, it would be impossible to maintain "the relative proportion of cell space to support services" as required by the district court because there would be 43.5% increase in population without any increase in support service cases. (Resp. App. 6a-7a). In a real sense, the detainees would have received the "worst of both worlds."

Throughout the decade of planning for the new jail, as the detainee population steadily rose, neither the petitioners nor any other party ever suggested that the decision in Bell v. Wolfish or the increases in population, or both, justified modification of the single occupancy requirement. On the contrary, in 1985, when the Sheriff sought increased capacity, he sought the authority to build a jail with more cells, based on the premise that each additional inmate would require an additional room. In response, the district

court expressly provided that the defendants were permitted to increase the capacity by any amount, so long as "single occupancy be maintained." (Resp. App. 6a). The petitioners assented to this order. The planning therefore continued without change. If the Sheriff had brought his motion at any time before the foundation was completed -- as late as early 1988 -- it would have been possible to change the design of the jail and obviate the problems discussed above. The Sheriff has conceded that he made the deliberate decision not to seek any change in the physical plant before completion of construction (C.A. App. 720); instead he simply waited until it was done, and too late to change, and then requested permission to double cell.

The Commissioner argues that, in the absence of the additional capacity sought by the Sheriff, state court judges will commit some defendants to halfway houses when they otherwise might have held them at the jail and some inmates will have to be transferred to older facilities not governed by single occupancy decrees. Thus, although he took no position on the issue in the district court, the Commissioner now argues that Judge Keeton's decision threatens the public safety and, moreover, was actually contrary to the interest of the plaintiff class. This is nothing more than sheer hyperbole. The record does not reveal a single instance in all the years of single occupancy at the old jail in which a dangerous prisoner was ever released. In fact, the record shows that persons selected by state court judges for half-way house commitment were chosen precisely because they do not constitute such threats. (C.A. App. 389, 399-400). Moreover, the inescapable fact is that when he filed his motion, the Sheriff was then able to operate a 342 cell jail on a single

occupancy basis -- and then when the new jail opened, there was an immediate 71 cell increase in the male capacity.

It is true that when capacity is reached, some detainees are transferred to other jails. Massachusetts is currently engaged in a massive jail construction program.^{10/} Pending completion, it is obviously not possible to provide complete relief to all detainees.^{11/} This did not, however, require the judge to jettison the relief guaranteed to the class in this decree and reduce the conditions of all to the lowest common denominator.

In sum, whatever the standard, it cannot be said that, as a matter of law, in light of all the circumstances, Judge Keeton was required to modify the decree. More fundamentally for present purposes, even if Judge Keeton

^{10/} New county correctional facilities are currently being constructed in Suffolk (1986 Mass Acts c.658, §1), Hampden (1986 Mass. Acts c.658, §4) Essex (1985 Mass. Acts c.799, §8) and Norfolk counties (1985 Mass. Acts c.799, §8). In addition, the Commonwealth has appropriated funds for several new correctional facilities. (1986 Mass. Acts c.658, §5).

^{11/} However, it is not true that this jail is the only one governed by a single cell occupancy decree. See Richardson v. Sheriff of Middlesex County, 407 Mass. 455, (1990) (single cell occupancy order for Middlesex County Jail upheld); Perry v. Fair, No. 89-40031-Z (D. Mass.) (consent decree of October 6, 1989 for Worcester County Jail and House of Correction requiring single cell occupancy); Brown v. Ashe; C.A. No. 81-0280-F (D. Mass.) (consent decree of July 26, 1990 mandating single cell occupancy for Hampden County Jail and House of Correction.)

were arguably wrong, that would not militate in favor of certiorari, which, if granted, would at best produce a decision closely tailored to the idiosyncratic features of this case. In the final analysis, this is simply a case in which the petitioners' arguments for discretionary relief were carefully considered, but rejected, below. There is no basis for review by this Court.

II. THIS CASE PRESENTS NO OCCASION TO CONSIDER THE QUESTION OF WHETHER A LOCAL OFFICIAL MAY COLLATERALLY ATTACK A DECREE TO WHICH HE CONSENTED ON THE GROUND THAT THE RELIEF WAS NOT LEGALLY REQUIRED.

Petitioner Commissioner argues that even though the Sheriff consented to entry of the decree, he is entitled to collaterally attack it on the ground that the relief is not constitutionally required. In the Commissioner's view, the Sheriff enjoys this right even in the absence of any change of circumstances whatsoever and whether or not the purposes of the decree have been achieved. Apparently, this right may be asserted at any time, whether one day or ten years after the Sheriff gave his consent and whether or not anyone relied upon the decree in the interim. Ironically, this contention, which is advanced on behalf of the Sheriff, has never been asserted by the Sheriff himself and was not suggested by anyone to the district court.

There is no basis for review of this question here.

First, in the posture of this case, the premise of the question -- that the relief surpasses constitutional

requirements -- has not been established. The district court specifically found it unnecessary to decide the issue. This issue is not the same as that presented in Bell or Rhodes v. Chapman, 452 U.S. 337 (1981). Those cases held that whether multiple occupancy offends the constitution depends completely upon the particular circumstances of the confinement.^{12/} Bell v. Wolfish, 441 U.S. at 535; Rhodes, 452 U.S. at 346. The precise issue here would be whether it would be constitutional to subject pre-trial detainees to extremely dangerous conditions -- multiple occupancy, for lengthy periods, in cramped and non-observable housing units -- which were created solely because the responsible officials first agreed to bind themselves to single occupancy and then chose not to take any timely action to conform the design of the facility to their new occupancy plan. It is strongly arguable that double celling in these circumstances is arbitrary and not reasonably related to a legitimate governmental objective and therefore constitutes unconstitutional punishment without due process. Bell v. Wolfish, *supra* at 539.

Second, it is far too late in the lawsuit to make this claim. No party objected at the time the First Circuit ruled that the conditions of confinement in the new jail

^{12/} Under the Sheriff's plan, detainees would be in their cells for 12 hours, fully half the day (as compared to only 7 1/2 hours in Wolfish, 441 U.S. at 541). And one third of the detainees here are held for more than sixty days (as compared to Wolfish where "over half of the detainees spent less than ten days at the jail, three quarters were released within a month and more than 85% were released within sixty days. *Id.* at 524-25, n.3).

would be subject to approval by the district court, see Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 100-02 (1st Cir. 1978). Nor did petitioner object to the decree -- he consented. Nor was there any objection when the district court entered the April 1985 order restating the obligation to maintain single cell occupancy in any larger facility. Again, petitioner assented. Nor did the petitioner support modification in the district court, or even object to its denial. Under basic principles of issue preclusion, petitioner may not raise the question at this stage of the litigation. See Montana v. United States, 440 U.S. 147, 153-154 (1979).

Third, this question has been recently and authoritatively decided by this Court. In Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986), the Court held that "a federal court is not necessarily barred from entering a consent decree because the decree provides broader relief than the court could have awarded after a trial," provided (1) the decree "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction," (2) the decree "further[s] the objectives of the law upon which the complaint was based, and (3) the relief is not prohibited by law. Id. at 525-26.^{13/}

The decree in this case clearly meets all three criteria. Petitioner does not contend to the contrary. Instead, he

^{13/} Local No. 93 was a 6-3 decision. Even the dissenters did not question the enforceability of such a consent decree upon a consenting party; they contended that a decree which goes beyond the law may not be imposed on an intervening party who does not consent. 478 U.S. at 539. Petitioner does not argue that Local No. 93 should be overruled.

suggests that a different result should obtain here because "[t]he Eleventh Amendment bars federal courts from requiring the sheriff, whose office is established by the Massachusetts Constitution, to provide inmates with more than the constitution requires." (Comm. Pet. at 29). He cites several cases holding that federal courts lacking judicial power under the Element Amendment cannot obtain it by consent decree. See Lelsz v. Kavanagh, 807 F.2d 1243, 1253 n.11 (5th Cir.), cert. dis. 483 U.S. 1057 (1987); Washington v. Penwell, 700 F.2d 570, 574-75 (9th Cir. 1983). But whether or not these cases were rightly decided, they are in no way in conflict with the decision here. The Sheriff is a county official, M.G.L. c.127 §16, and there is clearly no Eleventh Amendment bar. Mt. Healthy City School District v. Doyle, 429 U.S. 274, 280 (1977).

Petitioner's argument is utterly without merit. Petitioner's proposed rule would render consent decrees useless in all litigation with public officials, who would then be permitted to constantly relitigate, at will, any agreed-to relief they later contended was not actually compelled by law. As Judge Keeton noted, with considerable understatement, such a result "would make settlements in cases of this type worth very little." (Pet. App. 12a).

CONCLUSION

For the reasons stated above, the petitions for certiorari should be denied.

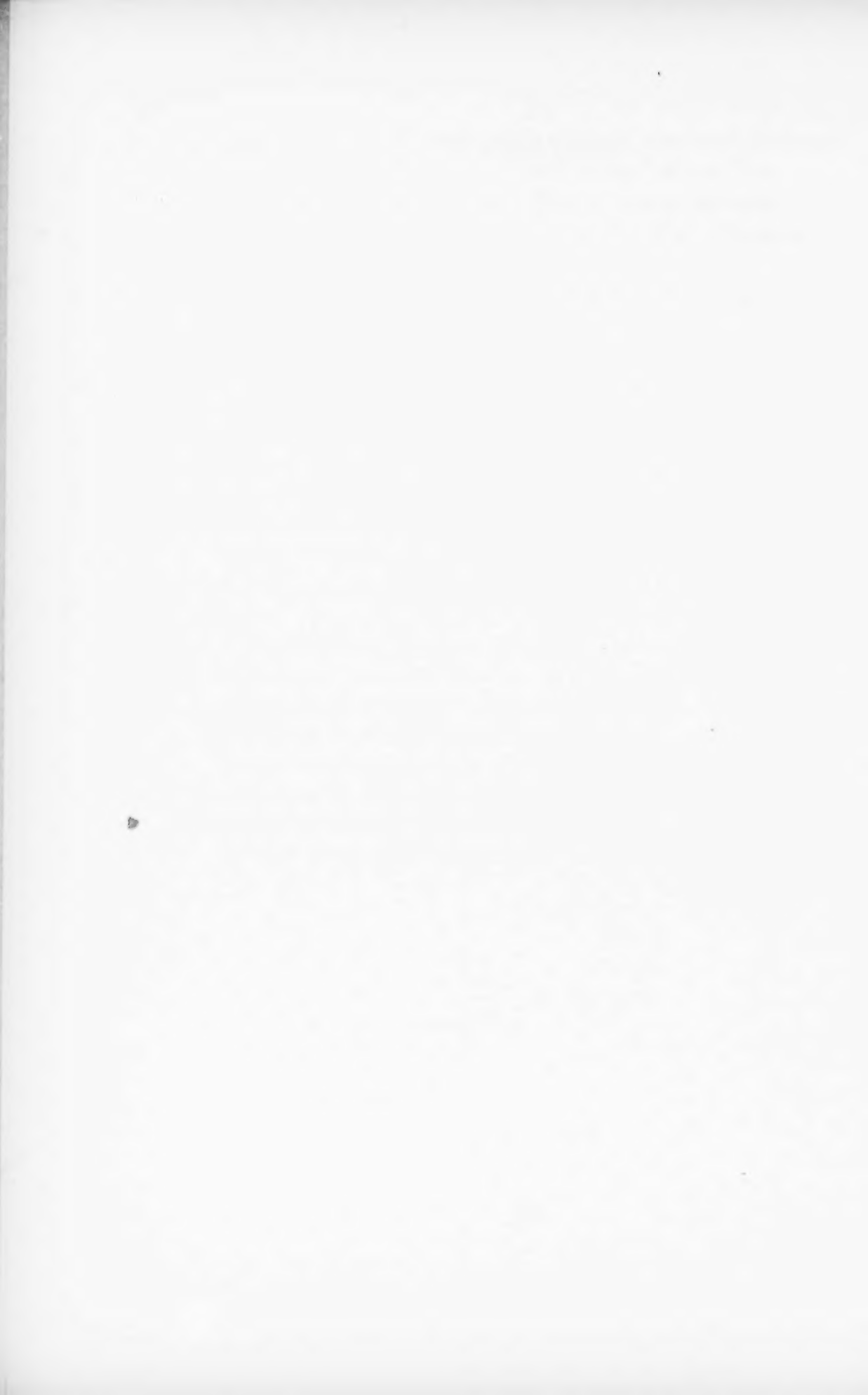
Respectfully submitted,

Max D. Stern
Counsel of Record
Lynn Weissberg
STERN & SHAPIRO
80 Boylston Street
Suite 910
Boston, MA 02116
(617) 542-0663
Counsel for Respondents

Of Counsel:

Alan B. Morrison
Public Citizen Litigation Group
2000 P. Street, N.W.
Washington, D.C. 20036
(202) 785-3704

January 18, 1991



APPENDICES

TABLE OF CONTENTS

APPENDIX A

Memorandum and Orders as to
Pretrial Detention of the
United States District Court
for the District of
Massachusetts dated October 3,
1978. 1a

APPENDIX B

Order of the United States
District Court for the District
of Massachusetts dated April
11, 1985. 6a



APPENDIX A

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

C.A. No. 71-164-K

**INMATES OF THE SUFFOLK COUNTY
JAIL, ET AL.,
Plaintiffs**

v.

**DENNIS J. KEARNEY, ET AL.,
Defendants**

**MEMORANDUM AND ORDERS AS TO
PRETRIAL DETENTION CENTER**

October 2, 1978

GARRITY, J. The defendants Mayor and City Council and Commissioner of Correction have fulfilled the conditions stipulated in the opinion of the Court of Appeals dated March 17, 1978. In particular, the Mayor and City Council have agreed on a site, viz., the present location of the Charles Street Jail. They have made a commitment to adequate unding by the enactment of loan orders totalling \$15,400,000 for the planning, designing, constructing and originally equipping a pretrial detention center which in our opinion meets the constitutional requirements of pretrial detention. The projected target date for the beginning of construction is September 1, 1979 and for completion, March 1, 1982. The plan which the court finds to be constitutional was filed by the city defendants

on September 28, 1978 entitled "Preliminary Architectural Program, Boston City Jail" (the "City Plan") and was enclosed with a letter dated September 27, 1978 from Donald B. Manson, Director of the Public Facilities Department of the City of Boston. The plan is prefaced by a two-page letter from Fred A. Powers to the Public Facilities Department dated September 26, 1978 and comprises 31 pages. The covering letter from Mr. Manson and the plan are attached hereto and incorporated in these orders, as Attachments A and B.

The Commissioner of Correction, acting pursuant to Mass. G.L. c. 34, § 14, has approved this plan with the qualifications stated in his filing on September 28, 1978 entitled Preliminary Response of the Commissioner of Correction and in the accompanying detailed analysis prepared by architectural planner Maria Theresa Cruz. At the hearing on September 28, counsel for the Commissioner and the city defendants stated that they were confident that the relatively minor deficiencies in the plan recorded by the Commissioner would be cured during implementation of the plan. The court therefore treats the Commissioner's preliminary response as the requisite statutory approval.

The court's conclusion that the City Plan meets constitutional requirements rests upon the filings heretofore described and the testimony at the hearing on September 28 of Fred A. Powers and on the positions of the parties stated at the hearing endorsing the City Plan. The plan is not an architectural design but rather a written description of the conditions of confinement of pretrial detainees as permitted in the opinion of the Court of Appeals dated March 17, 1978. The extent to which parts of the present Charles Street Jail will be renovated and the form of new construction, e.g., whether or not high-rise, have not yet

been decided by the planners. However, the critical features of confinement, such as single cells of 80 sq. ft. for inmates, are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions, are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards. According to Mr. Powers, who was spokesman for the architects at the hearing, further refinements in the architectural program will be made in the near future, at latest within one month, and a final architectural program will be prepared as soon as possible.

The Court of Appeals also stated in its March 17, 1978 opinion that this court should direct its attention to providing for an interim detention facility until renovation of the Charles Street Jail can take place, adding that such an interim facility could include use of the Charles Street Jail. Consideration of that question at this time would be premature. Until the nature and extent of renovations and new construction have been decided, the impact upon detainees housed at the jail and possible impingement on their constitutional rights cannot be evaluated. For this reason the court did not rule upon a motion of the Boston City Councillors filed September 22, 1978 that detainees continue to be lodged at the Charles Street Jail pending the completion of the new facilities.

Finally, the record of these proceedings should reflect our opinion that the conditions specified by the Court of Appeals' would probably not have been met except for the skill and professionalism with which Edward F. McLaughlin, Jr., Esquire, served as master and the assistance of Peter M. Lauriat, Esquire, his associate.

Accordingly it is ordered, adjudged and decreed as follows:

1. The City Plan filed September 28, 1978 is

approved as satisfying the terms and conditions set forth in the opinion of the Court of Appeals dated March 17, 1978 and in other orders entered by this court and the appellate court.

2. On or before November 3, 1978 the city defendants shall file and serve on the parties a modified architectural program and a modified estimated design schedule; and shall file and serve a final program and schedule as soon as practicable.

3. The city, county and state defendants shall without delay take all steps reasonably necessary to carry out the provisions of said preliminary, modified and final architectural program and estimated design schedule.

4. In carrying out the City Plan the defendants shall not change or depart from it in any substantial way except after written notice to the parties and court approval.

5. The parties shall endeavor to agree within one month upon a procedure and mechanism for monitoring compliance with these orders, such as periodic progress reports, perhaps filed jointly by some of the parties, perhaps to be filed in the first instance or only with Master McLaughlin. If they reach agreement, it should be filed with the clerk and the master. If agreement is not reached, separate proposals may be filed by any party on or before November 14, 1978.

6. While devising and executing the City Plan the defendants shall address explicitly its effect upon the inmates currently lodged at the Charles Street Jail and the conditions of their confinement. Programs and schedules shall contain subdivisions dealing with this subject. Pretrial detainees shall continue to be held at Charles Street Jail pending further order of the court. Any party may apply to the court for such an

order upon reasonable notice provided that the facts underlying any such application shall be set forth in affidavits.

United States District Judge



APPENDIX B

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

C.A. No. 71-162-K

**INMATES OF THE SUFFOLK COUNTY
JAIL, et al.,
Plaintiffs**

v.

**DENNIS J. KEARNEY, et al.,
Defendants**

**ORDER
April 11, 1985**

After considering plaintiffs' motion to modify the Consent Decree in light of changed circumstances, the Boston City Council's opposition thereto, and the views of all parties, the court finds that modifications are necessary to meet the unanticipated increase in jail population and the delay in completing the jail as originally contemplated.

It is therefore ordered, adjudged and decreed that the Consent Decree be modified as follows:

Nothing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity of the new facility if the following conditions are satisfied:

- (a) single-cell occupancy is maintained under the design for the facility;
- (b) under the standards and specifications of the Architectural Program, as modified, the relative proportion

of cell space to support services will remain the same as it was in the Architectural Program;

(c) any modifications are incorporated into new architectural plans;

(d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule. In the absence of modification(s) of the schedule hereafter ordered or authorized by this court, or by a court of the Commonwealth of Massachusetts, the schedule will be as stated below. Any modification(s) of this schedule ordered or authorized by a court of the Commonwealth will automatically amend, as well, the schedule authorized under this order, unless one of the parties in this action files a written objection, together with a memorandum fully explaining the grounds of objection, within 30 days after entry of the modifying order or authorization, or such lesser time period as may be fixed by this court upon motion showing cause for more expeditious resolution of any disputed issue.

STEP

COMPLETION DATE

a. Final Architectural Plans	April 21, 1985
b. Value Engineering Review	June 3, 1985
c. Completion of all details	August 3, 1985
d. Review by all parties	Sept. 3, 1985

e. Incorporation of all final documents	Oct. 3, 1985
f. Bid process	Dec. 3, 1985
g. Contract awarded, Construction starts	Jan. 3, 1986
h. Construction of facility	Jan. 3, 1990

UNITED STATES DISTRICT JUDGE

FEB 11 1991

OFFICE OF THE CLERK

⁽³⁾
Nos. 90-954; 90-1004.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY MEMORANDUM
In No. 90-954

CHESTER A. JANIAK,*
PETER J. SCHNEIDER,
ANN E. MERRYFIELD,
WALTER M. FOSTER,
BURNS & LEVINSON,
125 Summer Street,
Boston, Massachusetts 02110.
(617) 345-3000

Counsel for Petitioner Rufo

**Counsel of Record*

TABLE OF CONTENTS

THIS COURT'S RECENT DECISION IN <i>BOARD OF EDUCATION OF OKLAHOMA CITY v. DOWELL</i>, WARRANTS SUMMARY DISPOSITION OF THE PETITIONS FOR CERTIORARI FILED WITH THIS COURT	2
A. This Court's Decision In <i>Dowell</i> Requires Reversal Of The Denial Of The Sheriff's Motion To Modify The Consent Decree	3
B. In The Alternative, This Court Should Grant The Sheriff's Petition For A Writ Of Certiorari Based Upon Its Holding In <i>Dowell</i>	4
C. The Holding in <i>Dowell</i> Extends To The Facts Of This Case	5
D. Important Governmental Interests In Ensuring Pretrial Detainees Are Available For Trial And Protecting Public Safety Outweigh Alleged Privacy Interests Of The Detainees	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	4,7
<i>Board of Education of Oklahoma City v. Dowell</i> , ____ U.S. ____, 111 S.Ct. 630 (1991)	<i>passim</i>
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 561 (1984)	5

TABLE OF AUTHORITIES (cont.)

<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	3
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir. 1988), <i>cert.</i> <i>denied</i> , 488 U.S. 897 (1988)	5
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932) .	2,3,4,5
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	2

Nos. 90-954; 90-1004.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1990

**ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,**

v.

**INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.**

**GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,
PETITIONER,**

v.

**INMATES OF THE SUFFOLK
COUNTY JAIL, ET AL.,
RESPONDENTS.**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

**PETITIONER'S REPLY MEMORANDUM
In No. 90-954**

THIS COURT'S RECENT DECISION IN *BOARD OF EDUCATION OF OKLAHOMA CITY v. DOWELL*, WARRANTS SUMMARY DISPOSITION OF THE PETITIONS FOR CERTIORARI FILED WITH THIS COURT.

On January 15, 1991, after the Sheriff of Suffolk County had filed his petition for a writ of certiorari, this Court handed down its decision in *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. 630 (1991). In *Dowell*, the Federal District Court in 1972 had issued an injunction requiring busing and other measures to ensure compliance by the Board of Education of Oklahoma City with the Equal Protection Clause of the Fourteenth Amendment. The District Court did so after it had found both that residential segregation leading to school segregation had been state imposed and that school segregation itself had led to residential segregation. *Id.* at 633. In 1987, the District Court dissolved the injunction, upon motion of the School Board, after finding both that present residential segregation was the result of private decision making and economic factors and was not a result of former school segregation. *Id.* at 634-635. The Court of Appeals for the Tenth Circuit reversed, holding that the School Board had not met the "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932). *Dowell*, 111 S.Ct. at 635.

This Court reversed and reinstated the District Court's decision dissolving the injunction. In so doing, this Court first explained why *United States v. Swift & Co.*, was inapplicable, and second, defined the standard to apply when considering a request to dissolve an injunction which had been entered to remedy a constitutional violation.

First, this Court, citing *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), noted that the grievous wrong standard of *Swift* had been applied in the context of a continuing

threat of the defendants engaging in the unlawful restraint of trade. *Dowell*, 111 S.Ct. at 636. This Court contrasted the situation in *Swift* with the situation in *Dowell* where the School Board had acted in compliance with the requirements of the Equal Protection Clause of the Fourteenth Amendment and was unlikely to return to its former unlawful conduct. *Id.* at 636-637.

Second, this Court, quoting *Milliken v. Bradley*, 433 U.S. 267 (1977), held that, “. . . federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.” *Dowell*, 111 S.Ct. at 637. That is, stated affirmatively, an injunction is proper if its purpose is either to eliminate a condition which violates the Constitution or a condition which flows from such a constitutional violation.

The facts of the present case and the holdings by this Court in *Dowell* limiting the application of the grievous wrong standard of *Swift* and defining the limits of federal injunctions entered to remedy constitutional violations require either a summary reversal of the District Court's decision and the First Circuit's affirmation of that decision denying the Sheriff's motion for modification of the Consent Decree, or, in the alternative, require the granting of the Sheriff's petition for certiorari to clarify what standard should be applied to motions for modification of consent decrees in institutional reform litigation.)

A. This Court's Decision In *Dowell* Requires Reversal Of The Denial Of The Sheriff's Motion To Modify The Consent Decree.

In *Dowell*, a federal court injunction was held to be proper where it served the purpose of eliminating a condition which is a violation of the Constitution or a condition which flowed from such a constitutional violation. Here, the Sheriff has

closed the old Suffolk County Jail, where conditions violated constitutional standards, has opened a new Suffolk County Jail, which meets all constitutional standards, and has continued to maintain and operate that jail in compliance with constitutional standards. The only condition of the Consent Decree which the Sheriff has sought to modify, and that in a limited way, is the single-celling requirement, which is not constitutionally required. *Bell v. Wolfish*, 441 U.S. 520, 541 (1979). Thus, the Consent Decree in the present case, like the injunction in *Dowell*, has served its purpose of eliminating conditions which are in violation of constitutional standards and of ensuring that the requirements of the Constitution will be met in the future.

Based upon this Court's holding in *Dowell*, therefore, the denial of the Sheriff's motion to modify the Consent Decree should be summarily reversed.

B. In The Alternative, This Court Should Grant The Sheriff's Petition For A Writ Of Certiorari Based Upon Its Holding in *Dowell*.

In *Dowell*, this Court noted that the grievous wrong standard of *Swift* was limited to circumstances where there was a continuing threat by the defendant of unlawful action. There is no contention in the present case, and there can be no contention, that there is a threat that the Sheriff may violate constitutional standards. The old Suffolk County Jail has been closed, a new Suffolk County Jail, which meets constitutional standards, has been opened and has been maintained and operated by the Sheriff in accordance with constitutional standards. The only change in condition which the Sheriff seeks is to double-bunk a certain number of cells in the new Suffolk County Jail, a condition which does not violate constitutional standards.

The Respondent Inmates, Federal District Court and the Court of Appeals all relied upon the grievous wrong standard

of *Swift*. It is clear from this Court's holding in *Dowell* and the undisputed facts of the present case that the application of the grievous wrong standard of *Swift* was mistaken.

Given this Court's holding in *Dowell*, the mistaken application of the grievous wrong standard of *Swift* by the Courts below and the adoption of a "flexible standard" by a majority of the circuits, the Sheriff's petition for a writ of certiorari should be granted to resolve what standard should be applied to motions to modify injunctions and consent decrees which enjoin the conduct of state and local officials. In the alternative, this Court should grant the petition for a writ of certiorari and remand to the First Circuit for further hearing consistent with this Court's holding in *Dowell*.

C. The Holding In *Dowell* Extends To The Facts Of This Case.

Respondents attempt to distinguish this case from the Court's holding in *Dowell* by claiming that the *Dowell* decision only applies to court-imposed decrees and not consent decrees. This distinction, however, cannot escape the compelling rationale of *Dowell*.

There is no question that a court has the "inherent 'power . . . to modify an injunction in adaptation to changed conditions though it was entered by consent.'" *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 610 (1984) (Blackmun, J., dissenting) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)). The federalism concerns which serve as an underpinning of the holding in *Dowell*, are equally compelling regardless of how the injunction or decree was created. This is especially true where the decree concerns public institutions as compared to private litigants. *Plyler v. Evatt*, 846 F.2d 208 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988) (*Swift* standard for modification of consent decrees

is inappropriate in institutional reform litigation because its unique nature and demands necessitate a more flexible approach to modification).

In *Dowell*, which like the present case involved a local governmental body, this Court stated that the changing nature inherent in any public body is an important aspect to consider in determining what standard should be applied.

The [Swift] test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

Dowell, 111 S.Ct. at 630. Similarly, judicial supervision based on constitutional violations attributable to previous sheriffs of Suffolk County should not continue for the indefinite future, once those violations have been addressed. At the least, a consent decree should be treated flexibly where the condition sought to be changed does not implicate a constitutional right.

D. Important Governmental Interests In Ensuring Pretrial Detainees Are Available For Trial And Protecting Public Safety Outweigh Alleged Privacy Interests Of The Detainees.

Respondents argue that allowing double-celling of a portion of the cells would cause serious harm to the plaintiff class by destroying the privacy of the inmates. Res. Opp. at 21-22. However, no such privacy right as defined by Respondents exist. *See Bell v. Wolfish*, 441 U.S. at 537 (loss of freedom of choice and privacy are inherent incidents of confinement). Nor was the District Court's decision predicated upon any privacy right of the inmates. Sheriff's Petition at 5a. Moreover, Respondents fail to balance this interest against the important public interest and legitimate government objective of ensuring that pretrial detainees are available for trial, and protecting the public safety.

Respondents also argue that there is no evidence on the record that a dangerous prisoner was ever released due to overcrowding at the jail. Res. Opp. at 23. This argument carries no weight whatsoever. There is uncontroverted evidence on the record that approximately 10% of inmates placed in halfway houses escape custody and end up on the street.¹ Respondents' argument implies that an escaped inmate must first commit a heinous crime to create the legitimate governmental objective of holding securely persons who are committed to the Sheriff's custody on bail. This legitimate governmental objective should not be set aside, reduced or only partially met where, as here, it can be fully met by double-bunking without violating any constitutional standard.

¹ *Inmates of Suffolk County Jail v. Kearney*, No. 90-1440 (1st Cir. 1990), Appendix to Brief for the Defendant-Appellant, Sheriff of Suffolk County, Vol. I, p. 298.

CONCLUSION

In light of the *Dowell* decision, this Court should grant the Sheriff's petition for writ of certiorari and take one of the following actions: (1) summarily reverse the First Circuit based on *Dowell*, (2) hear argument in this Court on what standard to apply to motions to modify consent decrees in institutional reform litigation, or (3) remand the case to the First Circuit for further hearings consistent with the *Dowell* decision.

Respectfully submitted,

CHESTER A. JANIAK,*
PETER J. SCHNEIDER,
ANN E. MERRYFIELD,
WALTER M. FOSTER,
BURNS & LEVINSON,
125 Summer Street,
Boston, Massachusetts 02110.
(617) 345-3000
Counsel for Petitioner Rufo

**Counsel of Record*

APR 15 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

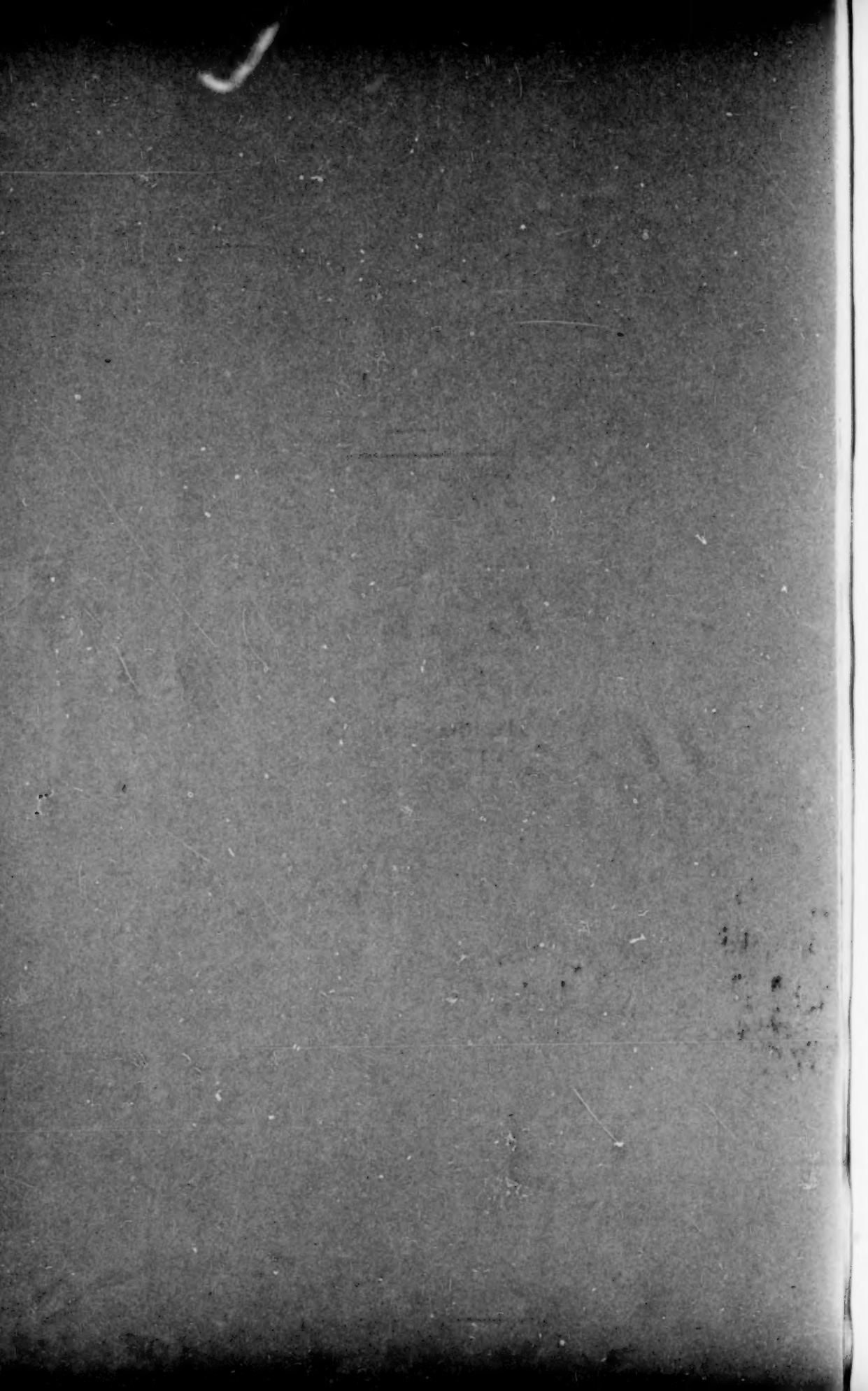
JOINT APPENDIX

CHESTER A. JANIAK*
PETER J. SCHNEIDER
ANN E. MERRYFIELD
WALTER M. FOSTER
BURNS & LEVINSON
125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000
Counsel for Petitioner Rufo.

MAX D. STERN*
LYNN G. WEISSBERG
STERN, SHAPIRO,
ROSENFELD & WEISSBERG
80 Boylston Street
Boston, Massachusetts 02116
(617) 542-0663
Counsel for Respondents

SCOTT HARSHBARGER, *Attorney General*
Commonwealth of Massachusetts
DOUGLAS H. WILKINS*, JON LARAMORE,
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
Counsel for Petitioner Rapone

**Counsel of Record*



<u>TABLE OF CONTENTS</u>	<u>Page</u>
Relevant Docket Entries.....	1
District Court Memorandum and Further Order Entered November 16, 1973.....	6
District Court Memorandum and Order Regarding Renovation of City Prison Facility and Closing of Charles Street Jail Entered June 30, 1977.....	22
Court of Appeals Memorandum and Order Entered September 2, 1977.....	34
Court of Appeals Memorandum and Order Entered December 15, 1977.....	44
District Court Memorandum and Orders as to Pretrial Detention Center, October 2, 1978.....	51
State and National Standards: Excerpt from Architectural Program, First Circuit Court of Appeals Record Appendix at pp. 185-189.....	61
Typical Male Housing Unit: Excerpt from Architectural Program, First Circuit Court of Appeals Record Appendix at pp. 234-240.....	72

Typical Female Housing Unit: Excerpt from Architectural Program, First Circuit Court of Appeals Record Appendix at pp. 241-244.....	84
Floor Plan of Nashua Street Jail: Excerpt from Architectural Program, First Circuit Court of Appeals Record Appendix at pp. 365-372.....	87
Plaintiffs' Motion to Modify Consent Decree dated February 19, 1985.....	88
Filing Letter from Chester A. Janiak to United States District Court Clerk dated April 5, 1985.....	102
Memorandum of the Sheriff of Suffolk County in Support of its Proposed form of Order Modifying the Consent Decree dated April 5, 1985.....	104
Proposed Order Modifying the Consent Decree dated April 5, 1985.....	107
District Court Order of April 11, 1985.....	110
Affidavit of Newman Flanagan, District Attorney of Suffolk County.....	114

Affidavit of George A. Vose, Jr., Acting Commissioner of Correction Department.....	118
Affidavit of Francis M. Roache, Police Commissioner for the City of Boston.....	122
Affidavit of Robert C. Rufo, Sheriff of Suffolk County.....	129
Affidavit of Elliot Paul Rothman, Architectural Consultant.....	146
Affidavit of John Buckley, Corrections Consultant.....	180
Supplemental Affidavit of Robert C. Rufo, Sheriff of Suffolk County.....	191
Sheriff of Suffolk County's Proposed Order and Order dated January 8, 1990.....	217
Affidavit of James E. Murphy, Corrections Consultant.....	221
Second Affidavit of Elliot Paul Rothman, Architectural Consultant.....	232
Second Supplemental Affidavit of the Sheriff of Suffolk County in Support of His Motion to Modify Consent Decree.....	239
Stipulation dated March 16, 1990.....	242

Motion of the Sheriff of Suffolk County for Modification of Consent Decree dated May 22, 1990.....	246
Diagrams.....	249

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendices to the printed Petition for Certiorari of Petitioner Rufo:

Appendix A

Opinion of the United States
Court of Appeals for the
First Circuit dated
September 20, 1990.....1a

Appendix B

Judgment of the United States
Court of Appeals for the
First Circuit dated
September 20, 1990.....3a

Appendix C

Memorandum and Order of the
United States District
Court for the District of
Massachusetts dated
April 9, 1990.....5a

Appendix D

Consent Decree of the
United States District
Court for the District
of Massachusetts dated
April 9, 1979.....15a

Appendix E

Opinion and Order of the
United States District
Court for the District
of Massachusetts dated
June 20, 1973.....23a



RELEVANT DOCKET ENTRIES

Inmates of the Suffolk County Jail
v. Thomas Eisenstat, et al.,
No. 71-162-G/K
United States District Court,
District of Massachusetts

DATE	PROCEEDINGS
1971	
Jan 21	Complaint
" 22	Summons Issued
" 22	Answer of Thomas S. Eisenstat Filed
Feb 18	Answer of Commissioner of Correction Filed
" 19	Application To Determine Class Action and To Direct Notice To Class
1972	
Jun 2	Partial Final Judgment Entered
Jul 7	Direction of Entry of Final Partial Judgment Entered

1973

Jun 20	Opinion and Order Entered
Nov 12	Memorandum and Supplemental Order Regarding the Transfer of Women Inmates Entered
" 16	Memorandum and Further Order Entered Regarding the Transfer of Women Inmates

1975

Mar 5	Order As to Bail Appeal Project Entered
Oct 20	Memorandum and Order Modifying the Decree dated June 20, 1973, Entered

1979

May 7	Consent Decree Approved
-------	-------------------------

1984

Oct [State Court Action Filed By
 Attorney General against the
 Sheriff.]

 [Action Filed by the Sheriff
 against the Mayor and the City
 Council of Boston to
 appropriate funds to build a
 new jail.]

1985

Jan 9 [Motion of Sheriff To Increase
 Staff of Bail Appeal Project in
 State Case]

Apr 11 Order to Modify Consent Decree
 " 22 Order to Modify Consent Decree
 and Order of 4/11/85

Dec 16 [Order No. 16 Entered in the
 State Case creating the
 "Charles Street Jail Judge"]

1986

Feb 24 [Order of State Court for Jail
to be Built at Nashua Street
and Completed by March 1990]

1989

Feb 23 [Order No. 39 entered in State
Case Amending Previous Order
No. 16]

Jul 17 Motion to Modify the Consent
Decree to Allow Double Bunking
filed by the Sheriff
" 25 Plaintiff's Opposition to
Motion of the Sheriff of
Suffolk County for Modification
of Consent Decree Filed

1990

Apr 9 Motion of the Sheriff of
Suffolk County for Modification
of Consent Decree Denied
" 30 Notice of Appeal Filed by the
Sheriff and Certification of
Ordering of Transcript

Inmates of the Suffolk County Jail
v. Dennis J. Kearney, et al.
NO. 90-1440
United States Court of Appeals
for the First Circuit

<u>DATE</u>	<u>PROCEEDINGS</u>
1990	
Apr 30	Notice of Appeal docketed
Sep 20	Judgment Affirmed

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO. 71-162-G

INMATES OF THE SUFFOLK COUNTY
JAIL, ET AL.,
Plaintiffs,

v.

THOMAS S. EISENSTADT, ET AL.,
Defendants.

MEMORANDUM AND FURTHER ORDER

November 16, 1973

GARRITY, J. A hearing in the above-designated case was held yesterday partly for the purpose of inquiring as to things done and contemplated by the defendants to implement the court's supplemental order dated November 12 that no women be kept at Charles Street Jail after November 26, 1973. The parties have not formulated a plan or agreement which would carry out the court's order and therefore it becomes necessary for the

court to enter this further, more specific order.

There are now 20 women inmates at Charles Street, of whom 4 have been convicted and 16 are detainees awaiting trial. One of the detainees is a federal prisoner. The only party, and indeed the only person in the Commonwealth, in a position to arrange for the confinement of these women inmates on November 26 at a facility other than Charles Street is the defendant Commissioner of Correction Hall, and he and his staff will be ordered to do so. The logical place to which these 20 women should be transferred is the Massachusetts Correctional Institution at Framingham, which is approximately 23 miles from Boston and where there are 24 beds currently available. The court is keenly

aware of the opinion of the Commissioner and the Superintendent at MCI Framingham, as explained in Mr. Bell's memorandum dated October 26, 1973 to Assistant Attorney General O'Malley filed herein on October 30, that keeping any women at Framingham other than those sentenced to confinement of three months or more will seriously disrupt important rehabilitative programs currently in operation at Framingham and will create security and other problems. Unfortunately the transfer of women inmates from Charles Street is required in order to enable the Sheriff of Suffolk County to comply with federal constitutional law, and hence the considerations urged by the Commissioner and Superintendent, valid as we presume them to be, must yield.

A handful of vacancies at institutions other than MCI Framingham may be available on November 26, to which the Commissioner may send some of the women inmates. Space for one additional woman prisoner currently exists at the Salem County Jail and two at the Plymouth County Jail. When the new Worcester County Jail at West Boylston becomes operational on December 10, there are prospective vacancies for four female inmates. It was predicted yesterday that the new Middlesex County Jail will open during the spring of 1974, and probably space will be available there. Various defendants and their assistants are currently exploring possibilities of converting some public facility within Suffolk County into a jail for women. This order will also provide that the

Women's House of Detention under the control of the Boston Police Department be made available for the overnight lockup of women en route to or from Framingham or other institutions and for detention during trials lasting only a few days.

Finally, there is precedent for housing women awaiting trial at Framingham. According to an opinion of the Attorney General on April 12, 1968, found at 1966-69 Massachusetts Reports of Attorney General 186-188, during 1968 Rhode Island had an average population at its Women's Prison of about 17 persons daily, of whom about 8 were pretrial detainees. Rhode Island desired to close its Women's Prison and to transfer all its prisoners to MCI Framingham. Then Commissioner Gavin indicated to the

Attorney General that he could "very easily" handle all the prisoners who would be transferred under this procedure. While the situation at Framingham has changed in many ways since 1968, it does appear that there is nothing essentially incompatible with the rights of pretrial detainees in keeping them at the Framingham institution; and obviously problems of transporting inmates to trials in Suffolk County can be no greater than in transporting them to courts in Rhode Island.

The second subject considered in detail at yesterday's hearing was the capacity of the Charles Street Jail, including a section heretofore occupied by women, to keep men awaiting trial in separate cells on and after December 1, 1973, as required by the injunction

contained in the final judgment herein dated June 20, 1973. The problem is due mainly to the state of disrepair of one-quarter of the cells, such that only 201 are presently usable. The number of men confined at Charles Street Jail as of November 15¹ is 226, of whom 12 are serving sentences and 27 are federal prisoners. There is nothing in the judgments entered in these proceedings which prohibits the doubling up of inmates convicted of crimes, and we shall assume that 6 cells will be used for their confinement, leaving a total of 195 cells for 214 detainees and federal prisoners. Single occupancy can be

¹ Of course the number of detainees, federal prisoners and persons serving sentences fluctuates; and there may be a greater or lesser number of inmates in any particular category as of the end of this month.

achieved by December 1 only by reducing the population of detainees and federal inmates to 195. As a practical matter, the population by December 1 must be reduced to approximately 190, leaving 5 or 6 empty cells, so that the defendants will not be in constant jeopardy of violating the court's order with the arrival of each new prisoner or the breakdown or destruction of the utilities in one or two cells. Thus the latter part of this order will require the defendants and the United States Marshal to take specific steps to make necessary reductions in the male population at Charles Street Jail.

In this respect also, the burden of responsibility will fall upon the defendant Commissioner of Correction because only he has the statutory

authority to make the necessary transfers. Under Mass. G.L. c. 276, § 52A, as amended, the Commissioner may, with the approval of the District Attorney, transfer to correctional institutions inmates who have been previously incarcerated in correctional institutions under sentence for a felony. A list of 36 such inmates was filed by Sheriff Eisenstadt at the commencement of the hearing yesterday, naming 20 inmates who had felony sentences at Concord, 12 at Walpole and 4 at Norfolk. There are currently approximately 174 vacancies for prisoners at Walpole and 66 at Norfolk; while there are none at Concord, there is no requirement in the statute that such inmates be transferred to the particular correctional institution in which they were previously confined. At the

hearing, Assistant District Attorney Thomas Dwyer, on behalf of District Attorney Byrne, gave approval as required by the statute to the transfer of such inmates to correctional institutions and the Commissioner is empowered to order their transfer forthwith. Under § 52A, as amended by c. 514 of the Acts of 1973, effective July 6, 1973, inmates awaiting trial may be transferred only by order of a Justice of the Superior Court. Without intimating any lack of jurisdiction to order in these proceedings that such inmates be transferred, there is no occasion for us to consider entry of any such order at this time. The number of transfers which the Commissioner will be required to make will be reduced to some extent by the court's order that the United States Marshal transfer some of

the federal prisoners at Charles Street before the end of the month.

The inconvenience to the Commissioner and to the courts which will undoubtedly be caused by transfers pursuant to §52A is expected to be temporary because 59 presently unusable cells can be repaired, 36 of them by work which can be accomplished within 30 workdays. Thus repairs which may be made before the end of the calendar year will increase the number of usable cells to 237, at which time the population at Charles Street can be stabilized at approximately 230 inmates. Repair of the cells which will take longer than 30 workdays to repair will increase the total number of usable cells to 260, permitting a population of about 250 inmates. These figures and the time

needed for repair are based upon statements made at yesterday's hearing by the senior construction engineer in charge of alterations and repair for the Department of Public Facilities. We anticipate that, as permitted in § 52A, the District Attorney will request the return of transferred inmates to Charles Street as soon as repaired cells become available.

Accordingly, it is ORDERED that:

1. Defendant Frank A. Hall, Commissioner of Correction, his assistants, agents and attorneys, on November 26, 1973 transfer to the Massachusetts Correctional Institution at Framingham or other state or county facility for the detention of women inmates, pursuant to the provisions of Mass. G.L. c. 276, § 52A, as amended, and

c. 127, § 97, as amended, or in any other manner found necessary to accomplish this order, all women confined to the Charles Street Jail as of November 26, 1973, whether serving sentences or awaiting trial.

2. Defendant Kevin H. White, Mayor of the City of Boston, and the City Councillors for the City of Boston,² their assistants, agents and attorneys, make any unused quarters in the Women's House of Detention available from and after November 26, 1973 for the keeping of women detained pending trial in any of the criminal courts located in Suffolk

² Under Mass. G.L. c. 34, § 4, the Mayor and Councillors are county commissioners for Suffolk County and as such have executive as well as legislative powers. See, e.g., c. 34, § 14. Therefore the county's duty to provide "a suitable jail," c. 34, § 3, is partly the responsibility of the Mayor and City Councillors.

County, or pending transfer to a state or county jail facility.

3. Defendants Thomas S.

Eisenstadt, Sheriff of Suffolk County, and Harold V. Langlois, Master of the Charles Street Jail, their assistants, agents and attorneys, notify the Clerks of the courts in which women inmates are awaiting trial of the date of their transfer and the institution to which transferred.

4. Until further order of this court, United States Marshal John A. Birknes, Jr., his assistants, agents and attorneys (a) lodge at the Charles Street Jail no federal prisoners who have been convicted and are awaiting transfer to a federal institution, and (b) lodge at the Charles Street Jail no more than 20 federal prisoners of whatever status.

5. Defendant Frank A. Hall, Commissioner of Correction, his assistants, agents and attorneys, pursuant to Mass. G.L. c. 276, § 52A, as amended, and c. 127, § 97, as amended, transfer a sufficient number of inmates at Charles Street Jail awaiting trial, who have been previously incarcerated in a correctional institution of the commonwealth under sentence for a felony, to reduce the number of male inmates at Charles Street Jail to 190 by November 30, 1973 and make such further transfers as may be necessary in the future to maintain single cell occupancy at the Charles Street Jail.

6. Defendants Thomas S. Eisenstadt and Harold V. Langlois, their assistants, agents and attorneys, from and after November 30, 1973, keep and receive at

Charles Street Jail no greater number of inmates awaiting trial than will permit 5 cells there to remain vacant for use when occupied cells become unusable and in other emergencies, and notify defendant Hall immediately whenever it becomes necessary to transfer prisoners to another facility in order to maintain compliance with the order contained in this paragraph.³

/s/
W. Arthur Garrity, Jr.
United States District
Judge

³ This memorandum and further order bears the date of November 16 because drafted on that date; however it was not filed with the Clerk or distributed to the parties until November 19, together with the notice as to the next hearing, which is being filed contemporaneously herewith.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

MEMORANDUM AND ORDERS¹ REGARDING
RENOVATION OF CITY PRISON
FACILITY AND CLOSING OF
CHARLES STREET JAIL

June 30, 1977

GARRITY, J. On October 6, 1976, in an order of reference, the court appointed Edward F. McLaughlin, Jr., of Boston, a master in these proceedings for the following purpose, among others: "to hear the parties, and any experts or consultants called by them, regarding proposals and plans for the gradual closing of the Charles Street Jail and to report to the court his recommendations for orders to be entered by the court."

¹ The orders are confirmatory of rulings made in open court on May 10, 1977 and recorded by the court reporter. See Local Rule 19(b).

Pursuant to this reference, the master filed three reports: on November 24, 1976, the Master's Report of Use of City Prison Facility; on March 29, 1977, the Master's Report Concerning Establishment of a Suffolk County Pretrial Detention Facility to Replace the Charles Street Jail; and on April 21, 1977, the Master's Report on Closing of Charles Street Jail.

At a hearing in these proceedings on April 14, 1977, the court, after eliminating Deer Island from consideration as a possible site for a facility to replace the Charles Street Jail, ordered the master to conduct further hearings and report with respect to possible legal objections to the use of a parcel of land on New Chardon Street as a site for a new jail facility.

At the same hearing, the court set down for hearing on May 10, 1977: (1) the defendant city council's motion filed April 12, 1977 for modification of the court's order of October 20, 1975 to postpone the deadline of July 1, 1977 set in that order for the closing of the Charles Street Jail; and (2) any objections filed to the master's November 24, 1976 report on use of city prison facility. In the interim, on April 21, 1977 the master filed his third report entitled Master's Report on Closing of Charles Street Jail, part of which contained further discussion of the city prison facility and renewed the recommendation that it be renovated and put into operation.

With respect to the master's November 24, 1976 report, only the

plaintiffs filed a timely objection, namely, that 15 days be fixed as maximum confinement in the city prison facility (as to which the court reserved decision until after the renovations should be completed). At the outset of the hearing on May 10, the Boston City Council handed up objections to the master's April 21, 1977 report, asserting that the master had not found that a renovated city prison would be "constitutionally preferential" to the existing Charles Street Jail and that renovation expenditures would be needless since the Charles Street Jail could house pretrial detainees under single cell occupancy. At the hearing on May 10, the court heard these objections and comments from various other parties. Then, acting pursuant to Rule 53(e)(2), Fed.R.Civ.P.,

the court accepted, with slight modifications, the master's November 24 report and ordered that the city prison be renovated and suitable for occupancy by November 1, 1977.²

Simultaneously, in connection with the city council's motion to postpone the July 1, 1977 deadline for closing the Charles Street Jail, the court also considered the master's April 21, 1977 report on closing of Charles Street Jail. After hearing the Boston City Council's

² This order was based on acceptance of the master's finding at p. 9 of the April 21, 1977 report, unchallenged at the hearing, that the "only facility which is available for use in conjunction with the court-ordered closing of the Charles Street Jail is the City Prison Facility ..." and the court's judicial notice that public safety necessitates provision of an assured replacement detention facility where persons ordered committed after November 1, who are too dangerous for predisposition release, may be jailed.

objections and comments of other parties, the court, again acting pursuant to Rule 53(e)(2), generally accepted the master's findings but rejected his recommendation that Charles Street Jail remain open until a new permanent pretrial detention facility in Suffolk County has been completed.³ For reasons stated at the hearing in open court and recorded by the court reporter, the court instead ordered that from and after November 1, 1977 no pretrial detainees or other prisoners be admitted to the Charles Street Jail.

ORDERS

At the court hearing on May 10, 1977, the following orders were entered:

³ In this respect, the court, for purposes of Rule 53(e)(2), considered paragraphs numbered 1-6 at pp. 12-13 of the master's April 21 report to be findings of fact and paragraphs numbered 7-9 at pp. 13-14 to be recommendations.

1. The defendant Mayor of Boston, in consultation with the defendant Sheriff of Suffolk County, shall forthwith submit to the Master and to the defendant Commissioner of Corrections such engineering and construction plans as may be required to permit the repairs and renovations to the city prison facility to be made.

2. The defendant Commissioner of Corrections shall, within one week following his receipt of the aforesaid plans, act upon those plans pursuant to M.G.L. c.34, §12.

3. The defendant Mayor of Boston, in consultation with the defendant Sheriff of Suffolk County, shall forthwith prepare and submit to the defendant Boston City Councillors as they are the Suffolk County Commissioners,

appropriation orders necessary to accomplish (a) the necessary renovations and acquisition of equipment to permit the city prison facility to be operational by November 1, 1977 and (b) recruitment and training of the additional personnel necessary for the proper operation of the city prison facility on an interim basis.

4. The defendants shall take such steps and expend such sums as are reasonable and necessary to complete the repairs and renovations and to provide the fixtures and furnishings which have been found to be necessary to the proposed use of the city prison facility.

5. The defendant Mayor of Boston shall use whatever emergency procedures are available to him and shall commence the said renovations and repairs

immediately and on an expedited basis in conformity with the plans submitted to the court.

6. The renovations and repairs to the city prison facility shall be completed not later than November 1, 1977. No prisoners may be admitted to the city prison facility prior to the completion of those repairs and renovations. Commencing immediately, the defendants shall file written progress reports with the Master on the 1st and 15th of each month.

7. The defendants shall report to the Master immediately concerning any delays in the scheduled renovations and repairs to the city prison facility, together with the reasons therefor and, if appropriate, any alternative or substitute materials or equipment which

may be available in order to speed completion of the renovations and avoid further delay.

8. The defendants shall report to the Master immediately concerning any unresolved dispute between or among them as to particular personnel, renovations or repairs which may be needed or any materials, equipment or fixtures which may be required.

9. On November 1, 1977 the city prison facility is to be placed in operation for the pretrial detention of some individuals who would otherwise be held at the Charles Street Jail.

10. The parties defendant are to use their best efforts, given all available resources, to place as many pretrial detainees as feasible in

supervised, community-based programs until their cases are reached for trial.

11. After November 1, 1977 no pretrial detainees or other prisoners may be admitted to the Charles Street Jail. Prisoners incarcerated there as of November 1, 1977 may be held there until criminal charges pending against them have been disposed of by the courts.

12. In order to prepare for the reduced jail capacity which will exist beginning November 1, 1977, the defendants Sheriff, Mayor, City Council and Commissioner of Corrections shall submit plans to the Master, according to a schedule determined by him, for processing and classifying pretrial detainees after November 1, 1977. This plan shall include criteria for selecting, from a given potential jail

population, those most in need of incarceration and contingency classification and selection procedures for a situation where a given potential jail population exceeds the number of cells available to house that population.

/s/
United States District Judge
W. Arthur Garrity, Jr.

[Certificate of Service
omitted in printing.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 77-1361
77-1362
77-1363

THOMAS S. EISENSTADT, et al.,
Appellants

v.

INMATES OF THE SUFFOLK COUNTY
JAIL, et al.,
Appellees.

MEMORANDUM AND ORDER

Entered September 2, 1977

Defendant-appellant Boston City
Councillors urge us to stay two of Judge
Garrity's orders of June 30, 1977, until
we have heard their appeal:

1. The order that the defendants
"take such steps and expend such sums as
are reasonable and necessary to complete
the repairs and renovations and to

provide the fixtures and furnishings which have been found to be necessary to the proposed use of the city prison facility", by November 1, 1977.

2. The order that "after November 1, 1977, no pretrial detainees or other prisoners may be admitted to the Charles Street Jail. Prisoners incarcerated there as of November 1, 1977, may be held there until criminal charges pending against them have been disposed of by the courts."

We see no reason to issue a stay of the second order. Certainly as far as pre-trial detainees are concerned, the substantive issues of this case have been resolved long ago. See Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973). In that case

it was decided that incarcerating pre-trial detainees at the Charles Street jail violated the constitutional rights of the detainees and that such incarceration should be halted by June 30, 1976.

It is now September, 1977. The district court's order does not go into effect until November 1. Not only have defendants failed to present any evidence that they will suffer irreparable harm pending appeal but on any reasonable balance of the equities involved, it is the plaintiff class whose interests have been kept in a legal limbo while the court has attempted to accommodate constitutional requirements with the practical considerations preventing immediate redress. That class cannot be denied its rights interminably. As the

court explained in Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) when confronted with a similar situation involving New York city's infamous "Tombs" (Manhattan House of Detention for Men), "[P]re-trial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all. When a district court is presented with a claim of violation of those rights, its proper function is to decide the case before it, whatever sympathy it may have for those who manage a great metropolis beset by grievous problems. Nor can similar considerations deflect us from the issues on appeal." Id. at 342.

While there is more of a substantive legal question as to the appropriateness of the district court's order as it

pertains to "other prisoners", defendants again fail to indicate what additional irreparable harm they, or anyone else, will suffer from the inclusion of "other prisoners" in the order. The appropriate time for evaluating the order, in these circumstances, will be when defendants' appeal is heard.

The request to stay the renovation of the city prison raises far more difficult problems. Clearly if a significant part of this work is completed before an appeal is heard, the question of whether or not to affirm the order for the renovation will be for all practical purposes moot. Courts are properly reluctant to order the expenditure of funds by a state or municipal body for major construction or renovation of prison facilities. Indeed,

several courts have disclaimed the power to do so. See Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971); Jones v. Wittenberg, 330 F. Supp. 707, 712 (N.D. Ohio 1971); aff'd sub. nom Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Padgett v. Stein, 406 F. Supp. 287, 302-303 (M.D. Pa. 1975); accord, Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975).

This court and others have, when necessary, ordered relief for prisoners that would require the expenditure of considerable funds. See Martinez Rodriguez v. Jimenez, 537 F. 2d 1 (1st Cir. 1976); Hamilton v. Landrieu, 351 F.Supp. 549 (E.D. La. 1972); Mitchell v. Untreiner, 421 F.Supp. 886 (N.D. Florida 1976). As was noted in Rhem v. Malcolm,

supra, at 341 n. 19, "[W]here the unconstitutionally-administered governmental function must be kept operating in any event . . . a court might have no choice but to order an expensive, burdensome or administratively burdensome remedy." The Supreme Court has approved such remedies in school desegregation suits on several occasions. See Milliken v. United States, 45 U.S.L.W. 4873 (June 27, 1977); Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

However, recognizing that a court has a particular authority or power says little about the guidelines under which it should be exercised. We have no reason to doubt the wisdom of the district court and the master's report in determining that the renovation of the

city prison is the only reasonable alternative for incarcerating pre-trial detainees after November 1. However, it may be preferable in this case to issue a more general order as to the standards that must be met before pre-trial detainees can be incarcerated after Charles Street jail ceases to be available. This would allow defendants to choose to renovate the City Prison, or to take other measures to provide for pre-trial detainee incarceration that would be constitutionally adequate. See Rhem v. Malcolm, supra, at 340-341.

Whenever possible these decisions should be left to the discretion of elected officials, acting within the mandate of the Constitution.

We reach this decision with reluctance, in light of the extensive

period of time during which the district court's efforts have not met with any forthcoming positive action to solve this long festering problem. We do so partly because of the imminence of the determination of the appeal and partly from our desire to give defendants the fullest measure of opportunity to fulfill Constitutional obligations and their responsibilities to the state and local community before requiring submission to an order of court.

To permit us to consider arguments that a less specific remedy should be ordered, we grant defendants' request for a stay of that part of the district court's order of June 30, 1977, requiring the renovation of the City Prison. Defendants' request that the order prohibiting the admission of pre-trial

detainees or other prisoners to the
Charles Street jail after November 1 be
stayed is denied.

By the Court,

/s/

Dana H. Gallup

Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Caption Omitted in Printing]

MEMORANDUM AND ORDER

Entered: December 15, 1977

During argument, counsel for the Boston City Council, counsel for the Mayor, and counsel for plaintiffs, all indicated their basic agreement as to the ultimate goal of constructing constitutionally adequate jail facilities. It was stated that within a period of two months, it might well be possible to secure basic agreement on an acceptable plan of action ensuring the prompt construction of such needed facilities. A number of circumstances have arisen which give substance to this possibility. They include the coming into office of a new City Council; the detailed planning which has already been

done by city and county staff; and the pendency of federal legislation which would assist in financing a dual purpose institution.

Any such reasonable possibility of voluntary agreement cannot be overlooked in a case where the sole issue remaining before the courts is not whether to grant relief but the character of the relief to grant. The original Inmates case, decided by the district court several years ago, is the law of the case: we are not faced with deciding anew whether new jail facilities are constitutionally needed; the question is what type of judicial order is necessary and proper in order to achieve this goal. It follows that it will be in the interest of all parties if they can agree voluntarily among themselves on an acceptable program

of compliance. Voluntary agreement will avoid the necessity of strict court-ordered measures that may place heavy burdens and limitations upon the city.

Since it will, in normal course, request this court a period of several months to decide the pending appeals, we believe it appropriate, in order to avoid further loss of time, to request the parties to meet forthwith, while the appeals remain under submission, and see whether they can agree upon the main ingredients of a plan of action for the construction of adequate jail facilities. These would include an acceptance of both interim and long range goals as to the conditions of confinement within the projected facilities, settlement of a site and target dates for implementation of the plan, and, most important, a good

faith commitment to make sufficient funds available when final detailed plans have been approved. While recognizing that there may be considerable honest disagreement as to the nature and cost of the facility as reflected in the final plans, we would insist on a commitment to meet the funding requirements of a constitutionally adequate facility despite some possible uncertainty as to exactly what that would entail in final terms. We stress that we do not see how a court could accept, on this record, an interim solution involving the use of the Middlesex jail facilities, city prison, or the Charles Street jail, or any combination thereof unless there is a definite commitment to make available sufficient appropriations for a constitutionally adequate facility to be

constructed by a definite date in the future.

We request counsel to report their progress to this court and by March 3, 1978, at the latest, to file a joint report indicating whether they have reached agreement and, if so, attaching a copy of their understanding and timetable. If counsel have not reached agreement, but individual parties wish to submit plans that meet constitutional standards for consideration by the court, they may do so. Should a positive plan be individually or collectively filed, the court might well remand the matter to the district court for detailed development of the final plan. Since such a chain of events might effectively moot the appeals, this court undertakes not to render its decision on the pending

appeals until after March 3, 1978. If no plan, or a constitutionally inadequate one, is submitted, this court will proceed to decide the pending appeals, ordering implementation of such remedies as it finds to be necessary and appropriate.

The parties should understand that whatever the status of affairs by March 3, this court does not envisage further or protracted delay in this matter. Failing the cooperation and assistance of the various parties in developing and implementing a solution to the problem of pretrial detainee incarceration, this court will be left with no alternative but to authorize far reaching action by the district court.

The injunction of the district court
is stayed until March 3, 1978.

By the Court

Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO. 71-162-G

INMATES OF THE SUFFOLK COUNTY
JAIL, ET AL.,
Plaintiffs,

v.

DENNIS J. KEARNEY, ET AL.,
Defendants.

MEMORANDUM AND ORDERS AS TO
PRETRIAL DETENTION CENTER

October 2, 1978

GARRITY, J. The defendants Mayor and City Council and Commissioner of Correction have fulfilled the conditions stipulated in the opinion of the Court of Appeals dated March 17, 1978. In particular, the Mayor and City Council have agreed on a site, viz., the present location of the Charles Street Jail. They have made a commitment to adequate

funding by the enactment of loan orders totalling \$15,400,000 for the planning, designing, constructing and originally equipping a pretrial detention center which in our opinion meets the constitutional requirements of pretrial detention. The projected target date for the beginning of construction is September 1, 1979 and for completion, March 1, 1982. The plan which the court finds to be constitutional was filed by the city defendants on September 28, 1978 entitled "Preliminary Architectural Program, Boston City Jail" (the "City Plan") and was enclosed with a letter dated September 27, 1978 from Donald E. Manson, director of the Public Facilities Department of the City of Boston. The plan is prefaced by a two-page letter from Fred A. Powers to the Public

Facilities Department dated September 26, 1978 and comprises 31 pages. The covering letter from Mr. Manson and the plan are attached hereto and incorporated in these orders, as Attachments A and B.

The Commissioner of Correction, acting pursuant to Mass. G.L. c. 34, §14, has approved this plan with the qualifications stated in his filing on September 28, 1978 entitled Preliminary Response of the Commissioner of Correction and in the accompanying detailed analysis prepared by architectural planner Maria Theresa Cruz. At the hearing on September 28, counsel for the Commissioner and the city defendants stated that they were confident that the relatively minor deficiencies in the plan recorded by the Commissioner would be cured during

implementation of the plan. The court therefore treats the Commissioner's preliminary response as the requisite statutory approval.

The court's conclusion that the City Plan meets constitutional requirements rests upon the filing heretofore described and the testimony at the hearing on September 28 of Fred A. Powers and on the positions of the parties stated at the hearing endorsing the City Plan. The plan is not an architectural design but rather a written description of the conditions of confinement of pretrial detainees as permitted in the opinion of the Court of Appeals dated March 17, 1978. The extent to which parts of the present Charles Street Jail will be renovated and the form of new

construction, e.g., whether or not high-rise, have not yet been decided by the planners. However, the critical features of confinement, such as single cells of 80 sq. ft. for inmates, are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions, are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards. According to Mr. Powers, who was spokesman for the architects at the hearing, further refinements in the architectural program will be made in the near future, at latest within one month, and a final architectural program will be prepared as soon as possible.

The Court of Appeals also stated in its March 17, 1978 opinion that this

court should direct its attention to providing for an interim detention facility until renovation of the Charles Street Jail can take place, adding that such an interim facility could include use of the Charles Street Jail.

Consideration of that question at this time would be premature. Until the nature and extent of renovations and new construction have been decided, the impact upon detainees housed at the jail and possible impingement on their constitutional rights cannot be evaluated. For this reason the court did not rule upon a motion of the Boston City Councillors filed September 22, 1978 that detainees continue to be lodged at the Charles Street Jail pending the completion of the new facilities.

Finally, the record of these proceedings should reflect our opinion that the conditions specified by the Court of Appeals' would probably not have been met except for the skill and professionalism with which Edward F. McLaughlin, Jr., Esquire, served as master and the assistance of Peter M. Lauriat, Esquire his associate.

Accordingly it is ordered, adjudged and decreed as follows:

1. The City Plan filed September 28, 1978 is approved as satisfying the terms and conditions set forth in the opinion of the Court of Appeals dated March 17, 1978 and in other orders entered by this court and the appellate court.

2. On or before November 3, 1978 the city defendants shall file and serve

on the parties a modified architectural program and a modified estimated design schedule and shall file and serve a final program and schedule as soon as practicable.

3. The city, county and state defendants shall without delay take all steps reasonably necessary to carry out the provisions of said preliminary, modified and final architectural program and estimated design schedule.

4. In carrying out the City Plan the defendants shall not change or depart from it in any substantial way except after written notice to the parties and court approval.

5. The parties shall endeavor to agree within one month upon a procedure and mechanism for monitoring compliance with these orders, such as periodic

progress reports, perhaps filed jointly by some of the parties, perhaps to be filed in the first instance or only with Master McLaughlin. If they reach agreement, it should be filed with the clerk and the master. If agreement is not reached, separate proposals may be filed by any party on or before November 14, 1978.

6. While devising and executing the City Plan the defendants shall address explicitly its effect upon the inmates currently lodged at the Charles Street Jail and the conditions of their confinement. Programs and schedules shall contain subdivisions dealing with this subject. Pretrial detainees shall continue to be held at Charles Street Jail pending further order of the court. Any party may apply to the court for such

an order upon reasonable notice provided
that the facts underlying any such
application shall be set forth in
affidavits.

/s/
W. Arthur Garrity, Jr.
United States
District Judge

(Excerpt From Architectural Program; See
First Circuit Record Appendix at pp. 185-
189.)

Suffolk County Detention Center
Charles Street Facility

Architectural Program

Honorable Kevin H. White
Mayor of the City of Boston

Donald B. Manson
Director of Public Facilities

A Joint Venture

Stull Associates &
Hellmuth, Obata & Kassabaum

Architects and Planners

January 1, 1979

demonstrate the feasibility of fitting
the program to the existing building.*

In the course of doing this it may be
found that certain portions of the

* "Fire safety. The design and
construction will meet the standards set
out in the 1976 edition of the Life
Safety Code of the National Fire
Protection Association (publication 101-
1976)."

present jail must be demolished for new construction, or that the program must be modified to fit the building.

Site Issues: Site circulation and entry for visitors, staff, prisoners and servicing must be analyzed as well as perimeter security. If proper enclosure for prisoner reception, exercise, and servicing can be achieved within the site, a more effective perimeter security concept could be considered other than the surrounding masonry wall.

Construction phasing: One of the most challenging aspects in the proposed renovation to the Charles Street Jail will be an evaluation of its potential for renovation if no new construction is planned. An analysis of the means to keep the existing facility in operation while portions are being renovated will

supply the needed information of possible additional costs and availability of temporary space.

Operating costs: Any analysis of new versus renovated old construction must include an evaluation of staffing implications in adopting the program components to the constraints of an existing structure. This will be compared to the staffing requirements as projected in the program.

State and National Standards: The following standards have been consulted as guidelines for the preparation of this program document. Particular attention has been given to program compliance to pre-trial detention and construction standards as legally mandated by the State of Massachusetts. These standards include the following:

- A. Tentative Draft, Standards for County Correctional Facilities:
Department of Correction;
Commonwealth of Massachusetts,
1978.
- B. Massachusetts Building Code:
Specific compliance to be met
during design and contract
document phase.

Other standards consulted:

- A. Composite of all of these factors will impart the necessary direction that the planning team must take in applying this program to the Charles Street Jail.
- B. Manual of Standards for Adult Local Detention Facilities:
Fourth draft; Commission on accreditation for corrections;

sponsored by the American
Correctional Association; 1977.

- C. Detention/Corrections Sub-
Committee Reports: National
Sheriff Association; 1975.
- D. Report on Corrections:
National Advisory Commission on
Criminal Justice Standards and
Goals; 1973.
- E. Tentative Draft of Standards
Relating to the Legal Status of
Prisoners: American Bar
Association Criminal Justice
Section; Joint Committee on
Legal Status of Prisoners;
American Criminal Law Review;
Vol. 14, No. 3; Winter, 1977,
pp. 377-625.
- F. Standards for Health Services
in Correctional Institutions:

American Public Health
Association; 1977.

CHARLES STREET JAIL POPULATION
PROJECTIONS

The population projections developed in the course of this study are intended to provide a guide in determining the cell capacity needs for the Charles Street Jail. A description of the methodology and findings of the population study are contained in a separate report. This section summarizes the results of the study as they impact on projected cell capacity.

The following factors were considered important in the development of inmate population projections:

1. There is a historical and direct correlation between the

- number of people incarcerated and community demographics.
2. Within limits the capacity of the jail influences criminal justice practices.
 3. Population is a valid predictor of the number of persons incarcerated.
 4. Changes in the criminal justice system cause discontinuities in the number of people incarcerated.
 5. Population projections are subject to assumptions about past criminal justice practices.

Each of these factors were evaluated and considered in the development of the population study. This analysis included attention to "what if" questions

regarding possible changes in the criminal justice system.

Summary Findings and Recommendations

The following male inmate population projections have been prepared to the year 1999. The projections were developed using regression analysis, a technique for measuring the relationship between variables in (e.g., inmate and general population). It allowed for the development of statistically reliable projections of future jail population, they were then tested against past experience.

The population projections are representative of all persons detained in the jail. They include persons residing in intake, medical, regular housing, protective custody, etc. The projections represent an inmate count taken at

midnight which means certain people may have been processed at intake during the day and released prior to midnight. It is believed that the number of inmates within this category is insignificant.

The following summarizes the population projections to the year 1999.

Year	Population Projections
1979	245
1980	243
1981	241
1982	239
1983	238
1984	236
1985-89	232
1990-94	226
1995-99	216

The year selected as a basis for determining the jail capacity is 1983, since the proposed construction is estimated to be completed by this date. To arrive at the total number of male inmates to be accommodated, a standard error of estimate of 27, and a review of

daily population counts from 1970 through 1977 were considered, in addition to the base estimate for the year 1983. In other words, if 27 was added to the base projection of 238 for the year 1983, we could expect the projections to be accurate to the extent that actual population would not exceed the projected amount of 265 ($238 + 27$) by more than an average of 62 days per year. Finally, seven persons have been added to the above to further account for extreme capacity fluctuations.

The resulting population has been the basis for programming cell space throughout the proposed detention center. It will accommodate anticipated male population needs beyond 1983, since a declining population is projected.

The population study evaluated past detention practices for female inmates. By applying the same methodology as was developed for the male population study, the study found that a capacity of 16 inmates will accommodate the female population needs through the year 1999.

(Excerpt From Architectural Program; See
First Circuit Record Appendix at pp. 234-
240.)

Suffolk County Detention Center
Charles Street Facility

Architectural Program

Honorable Kevin H. White
Mayor of the City of Boston

Donald B. Manson
Director of Public Facilities

A Joint Venture

Stull Associates &
Hellmuth, Obata & Kassabaum

Architects and Planners

January 1, 1979

F. Housing Units - Male

[DIAGRAM: See Joint Appendix at p.249]

- * "Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

F. Housing Units - male

General

Since the housing unit is where the inmate will spend most of his time while in the institution, it is the area most sensitive to design considerations.

Inmate activities which programmed spaces must respond to include the following:

1. Single occupancy rooms,
including furnishings for
sleeping, reading and writing.
Storage for clothing and other
personal items. Toilet and
lavatory normalized to the
degree possible.
2. Showers.
3. Small group meetings.
4. Passive recreation, i.e.
reading, table games,
television.

5. Dining.
6. Inmate/attorney visits.
7. Pay telephone access from within housing units.
8. Provisions for inmate cleaning own clothing-(see section 2.0.2 for requirements).
9. Responsive to differential security and inmate classification.
10. Temperature, lighting, and acoustical qualities per applicable standards.

It is recommended that a modular housing concept be developed to accommodate the above requirements. If a basic housing module is developed that meets the basic activity and constitutional requirements, the needs for different security and classification

requirements can be met by assignment procedures.

As the housing modules are developed during the design phase, certain units may require more or less security hardware and material requirements which should be carefully coordinated with the Sheriff's detention staff. These changes can be accomplished without detracting from the modular concept.

The housing module as proposed is based on 16 inmates per sub-living unit with two sub-units, or 32 persons representing a housing module. The housing module shall be supervised from one staff station. During the schematic design phase, and after careful study of the Charles Street site and the existing jail, it may be concluded that a sub-unit size of 18, 20, 22, or 24 may be more

appropriate. Such changes can be easily made without affecting the program integrity or significantly altering the enclosed space requirements. The goal should be to achieve the best staff/inmate ratio without compromising the constitutional rights of the inmate, or the small scale groupings as are desired.

*

Architectural Requirements	Area/Sq.ft.
*F. 1.a. Inmate rooms (32@70 sq. ft.)	2240
F. 1.b. Showers (4@40 sq. ft.)	160
F. 1.c. Dayroom (2@600 sq. ft.)	1200
F. 1.d. Janitor's closet (2@40 sq. ft.)	80
F. 1.e. Dining/multi-purpose	600
F. 1.f. Storage	50
F. 1.g. Food cart/trash	50
F. 1.h. Attorney/interview rooms (2@60)	120

F. 1.i. Control room/sally ports (As required per design concept)	200
F. 1.j. Staff toilets	60
Total net area	<u>4,760</u>

Total housing
modules required: 7.75

Total net area 36,890

*The single occupancy rooms have been sized to meet the minimum standards as devised by the following standard setting agencies. The Massachusetts Department of Correction's Code of Human Services Regulations, Chapter IX - Standards for County Correctional Facilities, Standard 972.3 calls for a minimum of 70 square feet for all new cell design. The Manual of Standards for Adult Local Detention Facilities, Standard 5103, as sponsored by the American Correctional Association requires at least 70 sq. ft. of floor

space when confinement exceeds 10 hours per day.

Functional Requirements

F. 1.a. Inmate rooms

Each inmate room shall contain a rigidly constructed bed frame, a toilet, a lavatory with hot and cold running water, a table and seat, a shelf for the storage of personal belongings, a mirror, and towel and clothing hooks. Each room shall have an exterior window with an unobstructed view of the site.

Artificial lighting shall be sufficient for reading purposes, no less than 100 foot candles at desk level shall be provided. Two sources of artificial illumination shall be in the room with one light under the inmates control.

Room doors shall have remote release type locks which can be opened and controlled

from the housing control station.

Selection of door type and hardware shall be coordinated with the Sheriff's department and meet applicable codes. *

F. 1.b. Showers

Accommodating 8-12 persons, depending on unit size design, each shower room will be adjacent to group space. Shower room fixtures and hardware should be consistent with security needs and should be designed for relative privacy and constructed so water does not drain into adjacent areas. Showers should have automatic water shut off as well as remote water turn off controls in the staff control room. They should include a seat and non-removable soap dish.

F. 1.c. Dayroom

Each sub-living unit shall have a dayroom for informal recreational activities. Furnishings shall include seating and lounge tables consistent with security requirements established for the unit. Dayrooms shall include audio communications with the housing control station and electrical outlets for television. *

F. 1.d Janitor's closet

Equipped with mop sink and storage shelf.

F. 1.e. Dining/multi-purpose

Sturdy, but movable tables and chairs shall accommodate dining and group meetings. Seating shall accommodate a minimum of 16 people, or one sub-living unit. Food shall be carted to unit dining room and re-heated. Dining room

shall include kitchenette equipped with sink, storage cabinets, electrical outlets, small refrigeration and beverage dispenser. Dining room floor material should consider appropriate maintenance requirements.

F. 1.f. Storage

This room shall provide storage space for miscellaneous housing unit supplies.

F. 1.g. Food storage/trash

Space and electrical outlets for cart storage and trash disposal.

F. 1.h. Attorney interview rooms

Access from dining/multi-purpose room. Accommodating contact visits, acoustical control shall assure attorney/client confidentiality. Visual supervision maintained by staff.

Consider locating within entrance sally port to housing unit.

F. 1.i. Control room/sally port

The number, size and location of control rooms may vary with respect to the housing unit design. Control room should be designed to permit maximum visibility to housing unit. Audio communication should be maintained between staff and inmates with housing unit. Room shall be equipped with appropriate electronic monitoring and control systems, writing surfaces, telephone, and storage cabinets for first-aid and other supplies.

Sally port should be in interlocking door, separated enough to allow passage of an ambulance cot.

F. 1.j. Staff toilet

Should be adjacent to control room
equipped with 1 w.c. and 1 lav.

- * "Although exceptions may arise from scale considerations, all services and amenities should remain the same as for the male housing units."
- * "Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

(Excerpt From Architectural Program; See
First Circuit Record Appendix at pp. 241-
244.)

Suffolk County Detention Center
Charles Street Facility

Architectural Program

Honorable Kevin H. White
Mayor of the City of Boston

Donald B. Manson
Director of Public Facilities

A Joint Venture

Stull Associates &
Hellmuth, Obata & Kassabaum

Architects and Planners

January 1, 1979

G. Housing Unit - Female

The goals and objectives for the housing
unit for men should be the same for women
as for men.* The exceptions may arise
from scale considerations. As
classification and security requirements
are further designed it may be necessary
to sub-divide further the 16 woman unit

as programmed. These decisions should be carefully coordinated with the Sheriff's department.

Architectural Requirements		Area/ Sq. ft.
G. 1.a.	Inmate rooms (16@70 sq. ft.)	1120
G. 1.b.	Showers (2@40 sq. ft.)	80
G. 1.c.	Dayroom	600
G. 1.d.	Janitor's closet	40
G. 1.e.	Dining/multi-purpose	320
G. 1.f.	Storage	50
G. 1.g.	Food cart/trash	50
G. 1.h.	Attorney/interview room	60
G. 1.i.	Control/sally port (As required per design concept)	200
G. 1.j.	Staff toilet	60
Total net area		<hr/> 2,580
Functional Requirements		
★		

Notes same as for Typical Housing Unit - male.

[DIAGRAM: See Joint Appendix at p.250]

*"Inmate laundry rooms shall be located to permit convenient access and staff supervision. Room placement and the number of laundry rooms required shall be resolved during the design phase. Each inmate laundry room shall contain high quality washing and clothes drying equipment, sink, sorting table, storage and ironing board."

(Excerpt From Architectural Program; See
First Circuit Record Appendix at pp. 356-
372.)

Suffolk County Detention Center
Charles Street Facility

Architectural Program

Honorable Kevin H. White
Mayor of the City of Boston

Donald B. Manson
Director of Public Facilities

A Joint Venture

Stull Associates &
Hellmuth, Obata & Kassabaum

Architects and Planners

January 1, 1979

Floor Plan of Nashua Street Jail

[DIAGRAM: See Joint Appendix
at pp. 251-258]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO. 71-162-K

INMATES OF THE SUFFOLK COUNTY
JAIL, ET AL.,
Plaintiffs,

v.

DENNIS J. KEARNEY, ET AL.,
Defendants.

PLAINTIFFS' MOTION TO
MODIFY CONSENT DECREE

Plaintiffs hereby move this Court to modify the Architectural Program which was incorporated into the Consent Decree entered in this action, in several respects. In support, plaintiffs say as follows:

1. The present architectural plans for the new Suffolk County Detention Center were made pursuant to the

Architectural Program and provide for a total of 309 cells.¹

2. The decision to design a facility of this size was based on a forecast of the projected need for pretrial detention facilities prepared by Peat, Marwick, Mitchell and Company.

¹ The Architectural Program provided for a total of 303 cells. See p. 5 (290 cells for male and female regular housing, intake and protective custody) and p. 31 (13 cells in medical unit). The architects' first schematic design, however, provided for 309 cells. All parties signed off on the schematic design in June, 1980. The breakdown of the 309 cells by function is as follows:

Regular Male Housing	224 cells
Male Holding (48 hour)	32 cells
Regular Female Housing	16 cells
Protective Custody	8 cells
Disciplinary Segregation	16 cells
Medical Unit:	
Infirmary	
Male Patient Care	5 cells
Female Patient Care	2 cells
Psychiatric Observatoin	6 cells

(See pp. 3-5 of the Architectural Program).

3. The present jail has a capacity of 266 detainees based on the single cell occupancy order of November 16, 1973 of this Court. Recently, it has become increasingly more difficult for the Sheriff to comply with the 266 population limit.² Furthermore, statistics prepared by the Sheriff's staff indicate that since 1980 the average number of detainees committed per day to the custody of the Sheriff has been as follows:

² Pursuant to M.G.L. c.276 §52A, the Sheriff has regularly transferred detainees, who have previously been incarcerated in state prisons on felony convictions, to state prisons. In addition, the Sheriff has made arrangements with some of the county jails to accept some Charles Street Jail detainees.

1980	190
1981	227
1982	281
1983	300
1984	320

4. It has become clear that in light of these statistics and the continuing population pressures, the planned 309 cell jail will be inadequate to house all Suffolk County detainees in conditions that meet the standards established in this case.

5. With respect to the funding of the new facility, the \$15.4 million appropriated by the City defendants will not cover the cost of the planned facility. On February 7, 1985 the Governor submitted a Special Act to the legislature to appropriate \$28 million for the new jail only on the express condition that the new jail be expanded to 435 cells.

6. In view of the population figures and the necessity of state funding for this project, plaintiffs move for the following modifications with respect to the housing units, the support services, and the construction timetable:

A. Housing Units

1. Male: On page 38 of the Architectural Program, the "Total housing modules required" to be modified by deleting "7.75" and inserting "12.25" in its place and the "Total net area" to be modified by deleting "36,890" and inserting "58,310" in its place.

2. Female: On page 42 of the Architectural Program, the number of inmate rooms (line 6

G.l.a.) to be modified by deleting "16" and inserting "30" in its place. The square feet of inmate rooms is therefore to be changed from "1120" to "2100", and the "Total net area" to be changed from "2,580" to "3560"³

³ These changes add 126 cells to the jail, bringing the total to 435. The breakdown according to function is as follows:

Regular Male Housing	320 cells
Male Holding (48 hour)	32 cells
Regular Female Housing	30 cells
Protective Custody	8 cells
Disciplinary Segregation	32 cells
Medical Unit:	

Infirmary

Male Patient Care	5 cells
Female Patient Care	2 cells

Psychiatric Observation 6 cells

B. Support Services

1. Indoor Exercise: On page 52 of the Architectural Program the size of the gymnasium is modified by deleting "4,200" square feet and inserting "4,600" square feet in its place. The total net area is changed from "6,080" to "6,480."⁴
2. Chapel: On page 55 of the Architectural Program, the size of the Chapel (line L.1.a.) to be modified by deleting "600"

⁴ No further changes in the outdoor exercise space because in the current design for 309 cells the outdoor exercise space has been substantially enlarged from the 7,680 square feet set forth in the Architectural Program at p. 50. The current design provides for 12,480 square feet at ground level, 3,481 square feet at the roof top and 1,740 square feet for protective custody inmates.

square feet and inserting "850" square feet in its place. The "Total net area" to be changed from "950" to "1100."

3. Laundry: On page 65 of the Architectural Program, the size of the Central Laundry (line 0.1.) to be modified by deleting "500" and inserting "1400" square feet in its place and the "Total net area" to be changed from "800" to "1700" square feet.

4. Kitchen: On page 62 of the Architectural Program, the receiving room (line N.1.a.) to be modified by deleting "200" and inserting "800" square feet in its place, the dry storage (line N.1.b.) to be modified by

deleting "600" and substituting "800" square feet in its place, the refrigerated storage (line N.1.c.) to be modified by deleting "250" and inserting "300" square feet in its place, the cart storage (line N.1.h.) to be modified by deleting "200" and inserting "300" in its place and the total net area is thus to be changed from 4,010 to 4,960" square feet.

5. Intake: On page 19 of the Architectural Program, the "temporary holding/court transfer (line C.2.e.) to be modified by deleting "250" and inserting "325" square feet, by eliminating lines C.4.a.,

C.4.b., and C.4.c. which are to be included in the male housing unit, and by eliminating lines C.7.a. and C.7.b.

6. Library/Education: On page 47 of the Architectural Program, the Legal Library (line I.2.b.) to be modified by deleting "350" and inserting "400" square feet and adding a second inmate toilet (line I.2.f.) with each toilet to be 50 square feet.

7. Support Services to Female Housing Unit: On page 42 of the Architectural Program, the Showers (line G.1.b.) to be modified by deleting 2 and inserting 4, bringing the square footage to 160 and the

dayroom (line G.1.c.) and dining/multi-purpose (line G.1.e.) to be combined and total 3600 square feet. A second attorney/interview room (line G.1.h.) to be added to make it 120 square feet.

8. Central Receiving: On page 68 of the Architectural Program, the receiving dock (line P.1.a.) to be modified by deleting "600" and inserting "675" square feet, the general storage (line P.2.a.) to be modified by deleting "1,000" and inserting "3,000" square feet and the building maintenance shop (line P.2.b.) to be modified by deleting

"600" and inserting "3000"
square feet.

9. Visiting: On page 58 of
the Architectural Plan, the
contact visiting (line M.l.e.)
to be modified by deleting
"1600" and inserting "2300"
square feet, non-contact
visiting (line M.l.f.) to be
modified by deleting "320" and
inserting "720" square feet,
attorney/interview rooms (line
M.l.g.) to be modified by
deleting "240" and inserting
"960" square feet. Lines
ML1.a., M.l.b., and M.l.c., to
be eliminated from visiting and
included in the lobby area.

C. Timetable for Construction

Pages 5 and 6 of the Consent Decree (paragraph 4) to be modified by deleting the timetable and substituting the following schedule:

<u>ACTIVITY</u>	<u>DURATION</u>	<u>COMPLETION DATE</u>
1. Modification of plans	3 months	April 21, 1985
2. Value Engineering Review	6 weeks	June 3, 1985
3. Completion of all details	2 months	Aug. 3, 1985
4. Review by all parties	1 month	Sept. 3, 1985
5. Incorporation of final documents	1 month	Oct. 3, 1985
6. Bid process	2 months	Dec. 3, 1985
7. Contract awarded, Construction Starts	1 month	Jan. 3, 1986

In all other respects the Architectural Program and the Consent

Deree shall govern the new Suffolk County Detention Center.

This motion has been assented to by the Commissioner of Correction and the Sheriff of Suffolk County.

Respectfully submitted,

/S/

Max D. Stern
Lynn Weissberg
Stern & Shapiro
80 Boylston St.
Suite 910
Boston, MA 02116

617/542-0663

[Certificate of Service
Omitted in Printing]

Date: February 19, 1985

[Burns & Levinson
Letterhead]

April 5, 1985

BY HAND

Clerk's Office, Civil
United States District Court
1525 John W. McCormack POCH
Boston, MA 02109

Re: Inmates of the Suffolk County Jail,
et al.
Vs: Dennis J. Kearney, et al.
Civil Action No. 71-162-K

Dear Sir/Madam:

Enclosed for filing in regard to the
above-captioned matter please find: (1)
Memorandum of the Sheriff of Suffolk
County in Support of its Proposed Form of
Order Modifying the Consent Decree of May
7, 1979 and (2) Order Modifying the
Consent Decree of May 7, 1979.

Kindly acknowledge receipt of the
same by returning the enclosed postcard.

Thank you for your cooperation in
this matter.

Sincerely,

Chester A. Janiak

CAJ/ljr
Enclosures
4706-10

cc: Lynn Weissberg, Esq.
Stephen Ostrach, Esq.
Michael Bolden, Esq.
Michael Walsh, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

MEMORANDUM OF THE SHERIFF
OF SUFFOLK COUNTY IN SUPPORT
OF ITS PROPOSED FORM OF ORDER MODIFYING
THE CONSENT DECREE OF MAY 7, 1979

The proposed form of order ("the Order") of the Sheriff of Suffolk County ("the Sheriff") should be adopted by this Court for the following reasons.

First, the Order, by including within it the Architectural Program and by providing for proportional changes in the Architectural Program to accommodate any increase in the number of cells from the 309 cells provided for in the Consent Decree, insures that the members of the inmate class are protected by providing for a facility which has already been adjudicated to meet constitutional standards and also insures that the

Sheriff will be provided with a facility that meets or exceeds contemporary correctional standards.

Second, the Order provides that those design issues which do not impact upon the inmate population involving administrative support space, shall be resolved by the user of the Jail, the Sheriff, and the supplier of the Jail, the Public Facilities Department of the City of Boston.

Third, the Order does not include within it architectural plans or drawings nor a schedule, thus, (one hopes) obviating the necessity of returning to this court each time, as is bound to happen in a project of this size and complexity, changes are made in plans or schedules. Further, members of the inmate class are fully protected with

respect to scheduling by the existing orders of the Supreme Judicial Court, which included in its order of January 21, 1985, a schedule for the commencement of construction of a new Suffolk County Jail.

Respectfully
submitted,
THE SHERIFF OF
SUFFOLK
COUNTY
By his attorneys

/s/
Theodore Tedeschi
Chester A. Janiak
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

ORDER MODIFYING THE
CONSENT DECREE OF MAY 7, 1979

It is hereby ordered, adjudged and
decreed as follows:

1. Nothing contained in the
Consent Decree shall prevent
the defendants from increasing
the capacity of a new Suffolk
County Jail ("the Jail")
provided that

- (a) single-cell occupancy
is maintained in the
design of the Jail;
- (b) the standards and
specifications of the
Architectural Program
included in the
Consent Decree are

modified so that the relative proportion of cell space to support services for inmates will remain the same as it is in the Architectural Program;

- (c) the design and size of administrative support space for staff personnel of the Jail shall be as determined by the Sheriff of Suffolk County and the Public Facilities Department

-109-

of the City of
Boston.

DATED: _____

United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

ORDER
April 11, 1985

After considering plaintiffs' motion to modify the Consent Decree in light of changed circumstances, the Boston City Council's opposition thereto, and the views of all parties, the court finds that modifications are necessary to meet the unanticipated increase in jail population and the delay in completing the jail as originally contemplated.

It is therefore ordered, adjudged and decreed that the Consent Decree be modified as follows:

Nothing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity

of the new facility if the following conditions are satisfied:

(a) single-cell occupancy is maintained under the design for the facility;

(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program;

(c) any modifications are incorporated into new architectural plans;

(d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule. In the absence of modification(s) of the schedule hereafter

ordered or authorized by this court, or by a court of the Commonwealth of Massachusetts, the schedule will be as stated below. Any modification(s) of this schedule ordered or authorized by a court of the Commonwealth will automatically amend, as well, the schedule authorized under this order, unless one of the parties in this action files a written objection, together with a memorandum fully explaining the grounds of objection, within 30 days after entry of the modifying order or authorization, or such lesser time period as may be fixed by this court upon motion showing cause for more expeditious resolution of any disputed issue.

<u>STEP</u>	<u>COMPLETION DATE</u>
a. Final Architectural Plans	April 21, 1985

- b. Value Engineering Review June 3, 1985
- c. Completion of all details August 3, 1985
- d. Review by all parties September 3, 1985
- e. Incorporation of all final documents October 3, 1985
- f. Bid process December 3, 1985
- g. Contract awarded,
Construction starts January 3, 1986
- h. Construction of
facility January 3, 1990

 /s/
Robert Keeton
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

AFFIDAVIT

I, Newman Flanagan, hereby depose
and say to the best of my knowledge and
belief:

1. I am the District Attorney of
Suffolk County.
2. It is my understanding that
Sheriff Rufo intends to ask
this Court to allow him to
house up to 673 prisoners in
the new facility. I strongly
endorse his request.
3. The dramatic increase in
serious crime in Suffolk County
has caused a backlog in Suffolk
Superior Court and a resulting
overcrowding problem at Charles
Street Jail. This has resulted

in the release of prisoners back to the community after the "cap" was reached and no other institution had space available for a transfer. This has increased the risk to the security of the public. If this policy of mandatory release continues, a high profile tragedy is inevitable.

4. Sheriff Rufo has been placing prisoners in available space in other facilities whenever possible to minimize the number subject to mandatory release. This practice has caused delays in transporting these transferred prisoners to court on time with resulting down

time of our limited judicial
resources.

5. In an effort to reduce the gang violence that is plaguing Roxbury, Mattapan and Dorchester, I have prioritized the prosecution of crimes committed by known gang members. A task force has been created to identify these gang members and to proceed with their cases by direct presentment to the Grand Jury. I intend to seek bail in an amount that will insure pre-trial detention and speedy trial. This will, no doubt, exacerbate the problem of jail overcrowding.

6. The Sheriff has informed me that procedural safeguards will be in place in respect to which prisoners will or will not be double bunked. The cell space in the double bunked cells appears to be adequate. The sheriff's request is certainly reasonable especially when considered with respect to the safety of the public.

For the foregoing reasons, I ask this court to allow the sheriff's request to house 673 prisoners in the new facility.

/s/
Newman Flanagan
District Attorney

[Jurat Clause Omitted in Printing]

AFFIDAVIT OF GEORGE A. VOSE, JR.

I, George A. Vose, Jr., being sworn,
depose and state as follows:

1. I am currently the Acting
Commissioner of the Massachusetts
Department of Correction (Department). I
am scheduled to be sworn in as
Commissioner on July 10, 1989.

2. Prior to my appointment to the
position of Commissioner, I served as
Deputy Commissioner, beginning in
February, 1986. I have been employed by
the Department since 1974.

3. Attached hereto as Table 1 is a
chart comparing monthly inmate population
totals for Department facilities to the
total capacities for these facilities.
This chart reflects a steadily increasing
rate of overcrowding in Department
facilities over the last ten years. In

January, 1979, population was 97.7% of capacity. In January, 1984, population was 148.6% of capacity. In January, 1989, it was 177.8% of capacity. As of May 31, 1989, it was 183.3% of capacity.

4. This increase in overcrowding has occurred despite the raise in capacity of 1061 (or 37.1%) in Department beds - from 2857 to 3918-over the last ten and one-half years, and the raise in capacity of 623 (or 18.9%) since January, 1987, alone. (This figure does not include an additional 605 modular beds for Department inmates which have been added since January, 1987).

5. As of May 31, 1989, there were additional cells in five Department facilities which were under construction, with a total planned capacity of 624 inmates. Also as of that date there were

additional cells in six Department facilities which were both planned and funded, with a total capacity of 735 inmates. There were also 870 modular beds which were both planned and funded for Department inmates as of July 6, 1989.

6. Attached hereto as Table 2 is a chart detailing the projected yearly average populations of Department inmates from 1989 through 1998. This projection indicates an increase of 24.2% (from 7573 to 9407 in the number of Department inmates over the next ten years. Accordingly, currently planned construction of both permanent and temporary beds will still not approach projected inmate population figures.

7. As a result, Department facilities, overcrowded as they are and

as they will be, as indicated by these figures, offer little in the way of convenient or viable alternatives for the temporary housing of county inmates. County inmates in such cases often need to be transported to far distant Department facilities. They are almost never given a single cell, and instead are often given a bed in a dormitory-style setting. The addition of county inmates to Department facilities also exacerbates the stress and strain already present among Department inmates and personnel as a result of the presently overcrowded Department facilities.

/s/
George A. Vose, Jr.

[Jurat Clause Omitted in Printing]

[CHART: See Joint Appendix at p.259]

AFFIDAVIT

I, Francis M. Roache, being duly sworn, do hereby state and depose that: I am the Police Commissioner for the City of Boston pursuant to Chapter 322 of the Acts and Resolves of 1962, with all the statutory duties and responsibilities enumerated therein.

The Boston Police Department will be negatively impacted by a decision to deny double bunking of prisoners at the new jail on Nashua Street. This Department has had an increase in arrests in each of the last three years. In 1986 there were 25,790 arrests for Part One and Part Two crimes. By 1988 that figure had risen 19% to 30,729. The figure for 1989 to date is 10,639 - an 11% increase over the comparable period in 1988. This increase in arrests translates directly into an

increase in the need for available beds for pre-trial detainees, a fact of which the Boston Police Department is painfully aware due to its own problems with overcrowding in pre-arraignment holding cells.

The most obvious result of overcrowding is the release of individuals back onto the streets prior to trial, either through a judicial reluctance to set bail due to the lack of space or forced release due to a number of prisoners in excess of the the court mandated cap. Projections of inmate population numbers establish clearly that without double bunking, the new facility will be over capacity when opened and the problem of release of detainees will continue. This is clearly both a logistical and a public safety problem.

Even if beds are available in other jails, valuable time and resources are expended transporting prisoners across the state; money and manpower which ought to be used on addressing the needs of the inmates in the Suffolk County Jail.

In addition, any time an inmate is released due to the cap, an individual who was determined by the courts to be inappropriate for return to the streets prior to trial, either due to a concern over appearance in court or as a threat to the community, sidesteps the judicial system and becomes a concern once again for the Boston Police Department and the community it serves. The "revolving door" which is perceived by police officers and the public as a result of inadequate jail space erodes the confidence of both the law enforcement

professional and the citizen in the quality and consistency of the judicial and correctional systems.

The existing court order is the result of a particular, unique set of circumstances which existed at the Charles Street Jail. The new facility has been very carefully designed to provide a safe and appropriate environment for inmates in anticipation of double bunking. There is no argument against double bunking which can justify the burden which would be imposed on the public by the overcrowding of the new jail facility and the resulting transportation or early release of inmates.

Date: 6/30/89

_____/s/
Francis M. Roache
Policy Commissioner
City of Boston

[Jurat Clause Omitting in Printing]

ADMISSIONS BY OFFENSE

1988

	HOMICIDE			MANSLAUGHTER			RAPE/ SEX ASS.			CRIMES AGAINST PERSON			DRUGS: POSSESSION			DRUGS: INTENT TO DISTRIBUTE			CRIMES AGAINST PROPERTY			LARCENY			OTHER			TOTAL ADMISSIONS PER MONTH		
	#	%	#	#	%	#	#	%	#	#	%	#	#	%	#	#	%	#	#	%	#	#	%	#	#	%	#	#	%	

January	5	.9	0	0	0	15	2.6	137	25.6	24	4.4	111	2.1	41	7.8	10	1.7	39	7.5	135	25.9	517
February	11	1.9	0	0	28	4.7	150	25.9	27	4.4	100	17.4	45	7.8	12	2.0	52	9.1	144	24.7	569	
March	8	1.2	0	0	25	3.7	173	26.7	47	7.2	142	22.2	40	7.2	13	1.9	67	10.5	119	18.2	634	
April	6	1.1	0	0	19	3.3	159	29.3	34	6.2	104	19.5	31	5.8	10	1.7	57	10.6	108	19.7	528	
May	3	.5	0	0	23	3.7	170	27.8	28	4.7	110	18.8	30	5.1	12	1.9	68	11.6	135	22.7	579	
June	9	1.5	0	0	25	4.0	162	27.10	48	7.7	121	20.4	39	6.6	13	2.1	40	6.3	129	20.8	586	

	HOMICIDE				MANSLAUGHTER				RAPE/ SEX ASS.				CRIMES AGAINST PERSON				DRUGS: POSSESSION				DRUGS: INTENT TO DISTRIBUTE				CRIMES AGAINST PROPERTY				LARCENY				OTHER				TOTAL ADMISSIONS PER MONTH	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%				
July	0	0	0	0	0	0	0	0	26	4.2	181	30.2	29	4.8	111	19.5	54	9.3	19	3.1	59	10.1	99	16.2	578													
August	8	1.0	1	.1	32	4.2	232	30.3	44	5.6	138	18.4	56	7.4	13	1.7	71	9.4	154	20.3	749																	
September*	13	2.0	0	0	24	3.6	170	26.1	51	7.7	137	21.2	46	7.0	7	1.0	35	5.4	549																			
October	8	1.2	0	0	28	4.1	188	28.6	45	6.9	143	22.1	31	4.7	9	1.3	68	10.5	122	18.5	642																	
November	6	1.0	0	0	24	3.8	160	26.0	35	5.6	146	24.2	29	4.7	12	1.9	59	9.7	129	19.7	600																	
December	6	1.1	0	0	13	2.2	179	32.4	32	5.6	136	24.9	26	4.8	11	1.9	63	11.6	74	13	540																	
Yearly Total	83	1.2	1	.01	282	4.0	2061	29.1	444	6.3	1499	21.2	468	6.6	141	2.0	709	10.0	1383	19.6	7,017																	

* One Page of Data is Missing

ADMISSIONS BY OFFENSE:

1989

[illegible]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

AFFIDAVIT OF ROBERT C. RUFO

Now comes Robert C. Rufo on oath and
says:

1. I am Robert c. Rufo, Sheriff of
Suffolk County. I became Sheriff of
Suffolk County in January, 1987. As
Sheriff of Suffolk County I am
responsible for the administration of the
Charles Street Jail, the only facility in
Suffolk County for holding pretrial
detainees. As Sheriff of Suffolk County
I will also be responsible for the
administration of the new Suffolk County
Jail under construction on Nashua Street.

2. Prior to becoming the Sheriff
of Suffolk County in January, 1987, I
was, beginning in 1977, the Special
Sheriff of Suffolk County. As Special

Sheriff of Suffolk County, I was responsible for the day to day administration of the Charles Street Jail, including operational matters, administration of the budget and personnel matters.

3. As Sheriff and Special Sheriff I have been involved in the planning for a new Suffolk County Jail, and I am familiar with the plans for a new jail, including the original design for a 309 cell jail to be build adjacent to the existing Charles Street Jail, with the expansion of that design to 453 cells and the jail not under construction on Nashua Street.

4. A 2=309 cell jail was designed in accordance with the Architectural Program which is part of the Consent Decree comprising: male housing: 224

cells, female housing: 16 cells,
disciplinary segregation: 16 cells,
protective custody: 8 cells, intake: 32
cells and medical: 13 cells.

5. The number of cells in the original 309 cell design was based on projections of the Suffolk County pretrial detainee population prepared by the accounting firm of Pete, Marwick & Mitchell found at pages 3 and 4 of the Architectural Program.

6. In October, 1984, the Sheriff of Suffolk County was sued by the Attorney General of the Commonwealth when the Sheriff refused to pick up and take into his custody pretrial detainees from courts in Suffolk County. At that time the capacity of the Charles Street Jail was 266 cells with five cells to be held open for use in emergencies only. The

number of pretrial detainees being committed to the Sheriff's custody was consistently exceeding the cap of 266. The Sheriff was, thus, unable to both comply with this cap and hold all the detainees committed to its custody. The Sheriff then brought suit against the Mayor and City Council of Boston, who collectively are the Suffolk County Commissioners, to compel them to fund and construct a new and larger Suffolk County Jail. True copies of various pleading from and orders entered in those two cases are found at Appendix 7, 8, 9, 12, 20, 21, 22 and 23.

7. Chapter 799 of the Acts of 1985 provided funding for the construction of the new Suffolk County Jail. The construction of that jail on Nashua Street commenced on September 1, 1987,

and the jail is scheduled for occupancy in March, 1990.

8. In 1985, the Sheriff because of increases in the number of detainees being committed to his custody, contrary to the projections contained in the Architectural Program, joined with the plaintiffs and moved for a modification of the consent decree to increase the number of cells in a new Suffolk County Jail from 309 to 435.

9. When the site of the new Suffolk County Jail was moved from adjacent to the Charles Street Jail to Nashua Street, the number of cells was increased to 453. The number and type of cells are set forth in the following table:

	<u>Original Design</u>	<u>Suffolk County Jail Now Under Construction</u>
	<u>309</u>	<u>453</u>
Male housing	224	282
Female housing	16	40
Administrative/ Disciplinary Segregation	16	66
Protective Custody	8	8
Intake	32	35
Medical*	13	22

*Infirmery, psychiatric observation,
suicide prevention.

—	—
309	453

46.6%
increase

<u>Type of Cell</u>	<u>Function</u>
Male housing	Hold male inmates.
Female housing	Hold female inmates.

Administrative segregation	Hold inmates who present problems that require that they be kept separate from the general inmate population.
Disciplinary segregation	Hold inmates who have been subject to discipline.
Protective custody	Hold inmates who are in need of additional protection from fellow inmates.
Intake	Hold inmates while they are being classified.
Medical: Infirmary	Hold inmates who are being treated for medical problems that do not require hospitalization.
Psychiatric observation	Hold inmates who exhibit psychiatric problems.
Suicide prevention	Hold inmates who present a risk of suicide requiring additional observation and care.

10. The design of the new Suffolk County Jail at Nashua Street is depicted

by the floor plans which appear at Appendix 15. The regular male housing cells are located in eight modular units, with each unit containing two tiers of 17 to 19 cells per tier, for a total of 34 or 38 cells in each modular unit. On the first level of each modular unit are a day room, including a kitchenette, a "quiet room", two counseling rooms and telephones. On the second level of each modular unit are an exercise room and a noncontact visiting area. The new jail also contains a law library, general library and classroom space. All areas within the new jail are climate controlled.

11. In each modular unit the common area which is open to all inmates when they are out of their cells consists of the day room, quiet room and exercise

room. Double-celling in each modular unit has been limited so that the amount of common area floor space per detainee exceeds the American Correctional Association's standard of 35 square feet.

12. The number of cells available at the Charles Street Jail has increased since the Consent Decree was entered into. From January 1, 1979, to June 30, 1987, there were 266 cells available (plus five for emergencies); from July 1, 1987, to March, 1989, there were 326 cells available (plus five for emergencies); from March 1989, to date, 342 cells are available (plus five for emergencies). Sixty prefabricated cells were opened adjacent to the main jail in July, 1987, under an order entered in the State Case following a motion by the Sheriff to increase the number of cells

at Charles Street. An additional 16 cells were opened in March, 1989. These were old cells which lacked plumbing and electricity and were rehabilitated at the request of the Sheriff.

13. It has been my responsibility both as Special Sheriff and as Sheriff to take the steps necessary to insure that the cap in place at the Charles Street Jail is complied with and that all detainees committed to the custody of the Sheriff are held. This has been done by transferring detainees pursuant to G.L. c. 2756, 52A to correctional facilities of the Commonwealth and by transferring detainees to other county facilities where space is available. This has become increasingly difficult to do as state and county correctional facilities have become increasingly crowded, have

exceeded their capacities and an increasing number of county facilities have been placed under court ordered caps. This problem became a crisis in the spring of 1989, when the number of detainees committed to my custody on a daily basis was well in excess of 400 and approached and then exceeded 500.

14. I have visited the state and county correctional facilities where Suffolk County pretrial detainees are held, and I am familiar with the conditions of confinement at those facilities.

15. At those facilities Suffolk County pretrial detainees are double-celled or held in dormitory settings, often in antiquated facilities, which sometimes lack even a basic medical clinic, and which usually lack

recreational facilities and social programs.

16. The new Suffolk County Jail at Nashua Street will be the most modern correctional facility in the Commonwealth and its conditions of confinement, even with double-celling, will be superior to those of any other facility.

17. The Bail Appeal Project, which provides attorneys and staff to conduct prompt bail reviews of Suffolk County pretrial detainees, has been in place since 1977. Upon motion of the Sheriff the expansion of that project was made by an order entered in the state case on January 9, 1985.

18. A number of "half-way house" spaces have also been utilized by the Sheriff to hold pretrial detainees. These are minimum security facilities and

a study of pretrial detainees committed to these facilities shows that 10% of the detainees have broken the terms of their commitment and have left the facility. These "walk-aways" are persons who were being held on bail, but were transferred to a half-way house rather than being released to the street during an overcrowding crisis at the Charles Street Jail.

19. I propose to double-cell at the Nashua Street Jail in accord with the following plan (the cells that would hold two pretrial detainees are shown on the plans which appear at appendix 15):

1. The special purpose cells
 - administrative/disciplinary segregation - protective custody and medical (infirmary and psychiatric observation and suicide prevention)

would not be used as regular housing cells, but only for the purposes for which they were intended.

2. In the common area - day room, quiet room and exercise room - the American Correctional Association's standard of 35 square feet of space per detainee would be exceeded.

3. The second bed in each cell would be installed "bunk bed" style to maximize usable floor space.

4. All cells in each modular unit of the new jail are under observation either directly or by closed circuit television from the control room. The control room is a glassed-in secure room which provides observation of the cells

and common areas of each modular unit.

5. A minimum of two jail officers would be outside the control room in each modular unit.

6. Double-celled pretrial detainees would be out of their cells for 12 hours per day.

7. No detainee would be double-celled with another detainee, except after having been evaluated by a classification program. Detainees would be classified as to their suitability for being housed with another detainee in accord with the classification program developed by the National Sheriff's Association. A description of this program appears at Appendix 39. The classification team reviewing each

detainee would consist of a physician, nurse, social worker and jail officer.

8. The Bail Appeal Project, providing for automatic Superior Court Bail Reviews of pretrial detainees committed to my custody, would be continued.

9. The Pretrial Control led Release Program would be continued.

10. Double-celling would not occur until all regular male housing cells had been filled.

20. It is my opinion, based upon my twelve years of experience as Special Sheriff and Sheriff and my familiarity with the Suffolk County pretrial detainee population, that double-celling in accordance with this plan would provide conditions of confinement better than

those at any state or other correctional facility where Suffolk County pretrial detainees have been held or may be held.

21. The statements contained in the foregoing affidavit are true and are based upon personal knowledge.

 /s/
Robert C. Rufo
Sheriff
Suffolk County

[Jurat Clause And Certificate
Of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

AFFIDAVIT OF ELLIOT PAUL ROTHMAN

I, Elliot Paul Rothman, hereby
depose and say that:

1. I am an architect licensed to
practice in the Commonwealth of
Massachusetts.

2. I have served as plaintiffs'
architectural consultant in the Inmates
of the Suffolk County Jail v. Kearney
case since 1971 and have been appointed
by the Single Justice of the Supreme
Judicial Court to serve as plaintiffs'
architectural monitor since 1986.

3. I have reviewed the Sheriff's
motion papers to modify the Consent
Decree to allow for double bunking.

4. My letter and report of
September 6, 1989 to plaintiffs' counsel

attached hereto accurately sets forth my opinions with respect to the following three questions:

- A. What standards will be violated if 200 inmates are added to the general population cells at the New Suffolk County Jail?
- B. How can residents be monitored within their cells if cells are double bunked?
- C. What was the latest date under which the new Suffolk County Jail could have been redesigned to accommodate additional modules that conform to the standards adopted in the Request for Proposal?

/s/
Elliot Paul Rothman

[Jurat Clause Omitted in Printing]

[Rothman
Letterhead]

6 September 1989

Ms. Lynn Weissberg, Esq.
Stern and Shapiro
80 Boylston Street, Suite 910
Boston, MA 02116

Re: Suffolk County Jail: Effect of Added
Residents
RRH Project No. 85013.03

Dear Ms. Weissberg:

Three major questions are addressed in order to identify the impact of double bunking on the new Suffolk County Jail, presently under construction. They are as follows:

- A). What standards will be violated if 200 inmates are added to the general population cells at the New Suffolk County Jail?
- B). How can residents be monitored within their cells if cells are double bunked?

C). What was the latest date under which the new Suffolk county Jail could have been redesigned to accommodate additional modules that conform to the standards adopted in the Request for Proposal?

The following text endeavors to answer the these questions. We shall be pleased to discuss our responses at your convenience.

Very truly yours,

/s/

Elliot Paul Rothman, AIA

[85013.03/A1082489]

SUFFOLK COUNTY JAIL

ARCHITECTURAL IMPLICATIONS OF DOUBLE BUNKING IN THE NEW SUFFOLK COUNTY JAIL

Three major questions are addressed in order to identify the implications for modification of the new Suffolk County Jail to accommodate additional residents. They are as follows:

1. What standards will be violated if 200 inmates are added to the general population cells at the new Suffolk County Jail?
2. How can residents be monitored within their cells if cells are double bunked?
3. What was the latest date under which the new Suffolk County Jail could have been redesigned to accommodate additional modules that conform to the standards of the RFP?

WHAT STANDARDS WILL BE VIOLATED IF 200 INMATES ARE ADDED TO THE GENERAL POPULATION CELLS AT THE NEW SUFFOLK COUNTY JAIL?

Two major sets of standards are being violated if the cells are double bunked. They include the standards of the American Correctional Association and the standards established by the Massachusetts Division of Capital Planning and Operations in their Request for Proposal for the new Suffolk County Jail. The RFP Proposal adopted the ACA Standards.

The following sections identify violations:

General Conclusions

Multi-purposed contact and non-contact visiting space needs to be increased.

We assume that no double bunking is proposed for the 48 hour module, administrative segregation, disciplinary segregation, protective custody, and the medical and psychiatric units. The 200 additional inmates represent an increase of 52% above the normal remaining modules.

Where double celling occurs, the area per resident is reduced from 70 NSF per resident to 35 NSF per resident. The standard is 70 NSF per cell.

Eighteen additional showers need to be installed.

Dayroom space is reduced in proportion to the increased number of residents, below the standard of 35 NSF (net square feet) per resident to 22-26 NSF per resident. The standard is 35 NSF per resident. All dayrooms in modules

with population increases are reduced to sub-standard levels.

Outdoor exercise space on the fourth floor west is reduced to 12.50 sq. ft. per resident compared to the standard of 15 sq. ft. per resident and is reduced to 9.92 sq. ft. per resident on the Sixth Floor.

Additional desk space is required for legal/administrative assistants and for caseworkers that will be required for the additional number of residents with no additional space available.

Nine additional attorney/counselling rooms are required. There is no additional space available.

An additional reading lamp fixture and an additional headphone receptacle

needs to be added to each double bunked cell.

Rated Capacity

The rated capacity is, as we understand, as follows. We require confirmation from the Sheriff as to his determination of rated capacity:

Total number of residents	653
Less Detention	
Disciplinary	16
Administrative	32 *
Less Medical	7
Less Psychiatric	15
Total Rated Capacity	383
Additional Capacity Proposed	
by Sheriff	<u>200</u>
Total Rated Capacity	583

* All cells are not administrative detention cells. For practical purposes and because of the

increased population we have assumed, in this analysis, that all cells will be administered as a special purpose unit and remain single celled.

Standards Applied

Standards applied are from the "Feasibility and Technical Study, Suffolk County Jail Boston (Division of Capital Planning and Operations, Mass. State Project No. CSB 86-1 STU, September 1986) as prepared by Sert, Jackson & Associates Inc., Architects and Planners.

Because the initial program, rather than the current architect's plans formed the basis for application of the standards, we have chosen to revert to the original program in referring to standards for rooms and spaces.

However, you will find, attached, our

calculation of all spaces under construction in accordance with the Hyman-Stubbins design and plans which are under construction. These calculations on the actual rooms and spaces under construction form the basis for our evaluation of compliance with the original standards.

Our conclusions and that of our engineers are as follows:

Room	Staff Locker
Ser. No.	SS-2 (male/SS-3 (female) 169 male staff and 40 female staff are provided for. Will there be space for additional staff to serve additional residents?

Room	Senior Officers' Lockers
Ser. No.	SS-4 40 senior officers are provided for. Will there be space for additional senior staff, if any additional are required, to serve the additional residents.

Room	Assembly/Chapel
Ser. No.	MP-8
	100 inmates are already provided for. The Chapel cannot be enlarged. Shifts will be required for the additional inmates.
Room	Multipurpose/Non-Contact Visiting
Ser. No.	MP-13
	Additional burden on use of this room. More utilization.
Room	Multipurpose/Contact Visiting
Ser. No.	MP-14
	Additional burden on Contact Visiting by 200 added residents; about 52% less space. Additional space can be added by filling in the entry overhang, if structurally feasible.
Room	Multipurpose/Classroom
Ser. No.	2 classrooms.
	There is a need for at least two more classrooms. The entry overhang can be filled in.

Room	Legal/Administrative
	Assistants
Ser. No.	PS-4
	5 spaces are provided; additional staff are required to support the additional inmates and additional desks need to be added. No space is available for the increase.
Room	Caseworker
Ser. No.	PS10
	11 offices are provided for 8 caseworkers, 1 case flow worker, 1 drug abuse worker, and 1 alcohol abuse worker. Additional office space is required to support the additional 200 cases. No space is available for the increase.
Room	Health Services
Ser. No.	HS
	Health service space is probably sufficient, because, in our opinion, there was an excessive number of patient bedrooms and psychiatric bedrooms originally programmed. Scheduling for greater utilization of programmed facilities is required.

Rooms

Single Bedrooms
Male Housing Unit/Female
Housing Unit, 48 Hour
Holding Unit, Protective
Custody Unit
Ser. No. MU-2/FU-2/
HU-2/SU-2/PC-2
Each room is 70 NSF.
Male housing for 2 = 35
NSF/Resident. 2 per cell
is unacceptable. Female
housing for 2 = 35 NSF/
Resident. 2 per cell is
unacceptable.
Disciplinary segregation
must be limited to 1
resident. Administrative
Segregation must be
limited to 1 resident.

Room
Ser. No.

Showers (see chart, p. 10)
MU-3/FU-3/HU-3/SU-3/PC-3
1 shower/8 inmates is the
standard. 18 additional
showers are required when
viewed on a module by
module count. There is no
space in which to add
showers.

Room
Ser. No.

Dayroom (see chart, p. 11)
MU-4/FU-4/HU-4/SU-4/PC-4
The standard is 35 NSF/
resident. Exclusive of
circulation space in
typical modules range from
23 NSF to 26 NSF.

Room	Outdoor Recreation (see chart, page 12) Male Housing, Female Housing, 48 Hour Holding Unit, Segregation Housing Unit/ Protective Custody Unit
Ser. No.	MU-7/FU-7/HU-7/SU-7/PC-7 15 NSF/inmate per ASC Standards (2-5145); 900 NSF minimum area per Massachusetts Regulations (972.03). Two recreation areas when reviewed on the basis of actual recreation/resident count are deficient, one on the fourth floor and one on the sixth floor.
Room	Attorney/Counseling Rooms (see chart, page 13) Male Housing Unit, Female Housing Unit, 48 Hour Holding Unit Segregation Housing Unit, Protective Custody Unit
Ser. No.	MU-11/FU-11/HU-11/SU-11/PC-11 1 attorney/counseling room is required for each 18 inmates. The addition of 200 inmates requires at least 9 more attorney/counselling rooms. When reviewed on a module by module basis 9 additional attorney counseling rooms are required, although there is no space to add them.

Discussion about the Distribution of the Residents

Because 48 hour holding, the segregation units, and protective custody are restricted to one resident per room, the distribution of the remainder places an undue burden on the remaining modules. For the purpose of this analysis, general population modules are assigned 58 inmates each.

Elevator utilization appears to be calculated for the single cell population at least one additional elevator may be needed. It can be added to the corridor opposite existing elevators by constructing a new shaft on the outside.

Summary of Resident Distribution

Dayroom	Existing Population 2 tiers	Additional Proposed Population 2 tiers	Total
---------	-----------------------------------	---	-------

NW	2016	38	20	58
	4016	36	22	58
	6018	40	18	58
SW	2010	34	24	58
	4010	34	24	58
	6009	34	24	58
NE	2069	38	20	58
	4044	35	0	35 (1)
	6051	32	0	32 (2)
	6057	8	0	8 (3)
SE	2063	34	24	58
	4038	34	24	58
	6040	34	0	34 (4)
C	5037	7	9	7 (5)
	5037	<u>15</u>	<u>0</u>	<u>15</u> (6)
	Total	453	200	653

- (1) 40 Hour Holding
- (2) Disc. Segreg.
- (3) Prot. Custody
- (4) Adm. Segregation (partial)
- (5) Medical
- (6) Psychiatric

Added number of Shower Rooms required:

At 1 shower per eight residents, a maximum of 14 shower stalls need to be added. There appears to be no space to add showers without impacting negatively on other required spaces. Because the

modules are generally the same size, many of the modules will be over crowded.

	Dayroom	Existing Pop. 2 tiers	Existing Shower	Proposed Pop. 2 tiers	Total Add'l Showers
NW	2016	38	5	58	2
	4016	36	5	58	2
	6018	40	5	58	2
SW	2010	34	5	58	2
	4010	34	5	58	2
	6009	34	5	58	2
NE	2069	38	5	58	2
	4044	35	5	0	0(1)
	6051	32	5	0	0(2)
	6057	8	0	0	0(3)
SE	2063	34	5	58	2
	4038	34	5	58	2
	6040	34	5	34	0(4)
C	5037	7	--	7	0(5)
	5057	<u>15</u>	--	<u>15</u>	<u>0(6)</u>
Total	453		65	653	18

- (1) 48 Hr. Holding
- (2) Disc. Segregation
- (3) Protective Custody
- (4) Adm. Segregation (partial)
- (5) Medical
- (6) Psychiatric

Dayroom Deficiencies

In our prior analysis, we identified an average reduction of dayroom of about 6 sq. ft. But when applied to the specific units, the deficiency suggests dramatic overcrowding as follows:

Modules with the following dayrooms are seriously deficient in dayroom space: NW 4016, NW 6081; NE 2069, NE 4044, NE 6051. The standard is 35 sq. ft. per resident.

	Dayroom	Proposed Total	Dayroom Space/ Module	Sq. Ft./ Res.
NW	2016	58	1554.00	26.79
	4016	58	1554.00	26.79
	6018	58	1387.12	23.91
SW	2010	58	1323.00	22.81
	4010	58	1323.00	22.81
	6009	58	1323.00	22.81
NE	2069	58	1554.00	26.79
	4044	35(1)	1387.22	39.63
	6051	32(2)	897.16	28.04
	6057	8(3)	420.40	52.55
SE	2063	58	1323.00	22.81
	4038	58	1323.00	22.81
	6040	34(4)	1323.00	38.91

C	5037	7	319.25	45.21
	5057	<u>15</u>	543.20	36.21
	Total	653		

- (1) 48 Hour Holding
- (2) Disc. Segreg.
- (3) Prot. Custody
- (4) Adm. Segregation (partial)

Analysis of Outdoor Recreation

Outdoor recreation space no. 6013 is seriously deficient in outdoor recreation space.

Outdoor Space	Proposed Total	Outdoor Space Module	Sq. Ft./ Res.
SW2010/2014/ NW 2016	58 <u>58</u>	1806.40	15.57
Subtotal	116		
SE 2063/2067/ NE2069	58 <u>58</u>	1806.40	15.57
Subtotal	116		
SW4010/4014/ NW4016	58 <u>58</u>	1450.00	12.50
Subtotal	116		
SE4038/4042/ NE4044	58 <u>35</u>	1450.00	15.59
Subtotal	93		

SW6009/6013/	58	1150.40	9.92
NW6018	<u>58</u>		
Subtotal	116		
SE6040/6044/	34(1)	1150.40	15.54
NE6051	32(2)		
NE6057	<u>8(3)</u>		
Subtotal	74		
C 5037	7	319.25	46.00
C 5037	<u>15</u>	543.20	36.00
Subtotal	22		
Total	653		

- (1) Adm. Segreg. (partial)
- (2) Disc. Segreg.
- (3) Prot. Custody

Added number of Attorney Counselling Rooms:

At 1 per eighteen residents, a maximum of 5 attorney counselling rooms room needs to be added. There appears to be no space to add these rooms without impacting negatively on other required spaces. Because the modules are generally the same size, many of the modules will be overcrowded.

Dayroom	Existing Pop. 2 tiers	Existing	Prop. Pop. 2 tier	Total Add'l Atty./ Couns. Rooms Req.
NW	2016	38	2	58 1
	4016	36	2	58 1
	6018	40	2	58 1
SW	2010	34	2	58 1
	4010	34	2	58 1
	6009	34	2	58 1
NE	2069	38	2	58 1
	4044	35	6	35 0(1)
	6051	32	2	32 0(2)
	6057	8	1	8 0(3)
SE	2063	34	2	58 1
	4038	34	2	58 1
	6040	34	2	34 0(4)
C	5037	7	--	7 --(5)
	5057	<u>15</u>	--	<u>15</u> --(6)
Total	453	29	653	9

- (1) 48 Hr. Holding
- (2) Disc. Segregation
- (3) Protective Custody
- (4) Adm. Segregation (partial)
- (5) Medical
- (6) Psychiatric

Impact on Construction Schedule

We have seen no information on the means of constructing the additional beds. However, if properly organized the addition of the bunks themselves need not defer the completion date. However, all bunks and required design modifications would need to have been ordered this summer in order to not affect the occupancy date. Installation once occupancy is completed will be disruptive, time consuming and even costly.

Conclusion

It appears desirable to distribute the additional 200 residents throughout the institution rather than localize them in a few of the housing units, because the distribution reduces the impact of less dayroom space, less contact visiting

space and less space for legal counselling. Outdoor recreation becomes more balanced with a distribution of the added population.

Common service spaces such as central visiting, the library, classrooms and other resources spaces all need to be increased in size.

B). HOW CAN RESIDENTS BE MONITORED
WITHIN THEIR CELLS IF CELLS ARE
DOUBLE BUNKED?

B1). Observation Windows in the Doors of
Each Cell

Sketch SKO-1: Partial NW Module at
Dayroom 2010, Location of Residents
Room Plan detail shows a typical
module selected for illustrative
purposes.

The cells in the general modules all
have glazed lights, generally dimensioned

5-3/8" x 33-7/8". The typical door design is shown on Sketch SKO-6, Typical Resident Room Door Types. Officers can observe residents lying on their cots from the glass windows. When the cell door is closed it will be difficult to hear any sounds from the cell which is sound isolated. The glazed viewing windows in each door were intended to assist officers in suicide control and in their count of inmates. They were not intended for general observation, because two people were not to be in the cells. Sketch SKO-6 also illustrates examples of two doors intended for observation in the medical and psychiatric rooms.

The new Suffolk County Jail was designed for single cell occupancy. It was specifically designed to protect the privacy of the inmates. In addition, the

toilet was designed for privacy so that the back of the inmate faces the door and the front faces the head of the bed when he/she is sitting on the toilet.

Sketch SKO-5: Residents Visibility at Typical Type "B" Resident's Room

illustrates what can be viewed vertically by an officer located outside the cell if two bunks are installed.

Sketch SKO-5: illustrates how much of the cell can be viewed horizontally by an officer located outside the cell if two bunks are installed.

When two people occupy a cell the design parameters change significantly. More window area at the door is required in order to assure observability by the officer. In addition, the toilet should have a barrier between it and the bunk beds, so that the user can not be

observed easily by the second inmate.

Sketch SKO-4: Section B illustrates the vertical viewing limits of officers from the central control station into each cell.

Sketch SKO-2: Resident Visibility from Housing Control (Level 2) and Sketch SKO-3: Resident Visibility from Housing Control (Level 3) illustrates the horizontal viewing limits of officers from the central control station into each cell.

From a practical point of view the officers from the viewing station need binoculars or telescopes to observe through the narrow window slots.

A second bunk should be installed in one typical residents room to test observability. Unfortunately, the Architects and Contractor have failed to

provide mockups of the full residents room when requested in the past, and we need assurances that such a mockup will be completed in a timely fashion.

B2). Video Camera

There are six closed circuit TV cameras proposed for the Quiet Rooms of modules, in Rooms 2005, 2058, 4005, 4033, 6004, and 6035.

There is no provision for closed circuit TV cameras in the cells. If needed to monitor activities within the cells (privacy of the inmate issues, notwithstanding), CCTV's could be located above the lavatories in such a manner and with an appropriate lens to observe both bunks. Wiring could be installed in conduit within the ductshaft.

C). WHAT WAS THE LATEST DATE UNDER WHICH THE NEW SUFFOLK COUNTY JAIL COULD HAVE BEEN REDESIGNED TO ACCOMMODATE ADDITIONAL MODULES THAT CONFORM TO THE STANDARDS ADOPTED IN THE REQUEST FOR PROPOSAL?

The new Suffolk County Jail was constructed in two phases. First the pilings that support the structure were installed. Then the structure above the pile caps was erected upon formal authorization by DCPO to proceed.

The organization of construction using piles permitting DCPO to authorize discreet construction phases of work.

If the Sheriff of Suffolk County determined that additional inmates should be added, it would have been

possible to add additional modules. Each of the modules met standards agreed upon by the DCPO and counsel under the Request for Proposal documentation.

The latest dates that the Sheriff could have reasonably made the determination to add additional modules were generally between the last week in March and the third week in April 1988. A fixed date would have been 20 April 1988 a day before steel erection commenced.

Then the piles and pile caps were being completed, all shear walls had not yet been poured, and the foundation walls that had been poured were exposed, all before steel was to be erected above the foundations. These activities were

occurring at different times across the site. It is important to note that steel shop drawings were being approved, but steel had not yet been shipped so that modifications, if required, could have been made in the fabrication mill.

In addition, if additional foundation support were required as a result of the vertical addition of modules, they could have been added and pile caps could have been modified for additional design loads before steel was shipped to the site.

Following are rates describing construction activity called from Hyman-Stubbins construction meeting notes.

Driving of production piles
commenced on 11/24/87 (see HSI,
Hyman-Stubbins Inc.

Construction Progress Meeting
No. 7 notes, dated November 25,
1987).

Alison Nichols, Project Manager
for HSI, reported that as of 23
March 1989 the 'majority of the
wall had been poured along 1
line and the majority of the
'interior' building pile caps
had been poured. A mid April
start for erection of
structural steel was schedule
(see HSI, Construction Progress
Meeting No. 24 notes, dated
March 23, 1987.

DCPO issued a letter on May 4, 1988 in which DCPO still had yet to obtain a complete set of approved plans and specifications from Hyman-Stubbins. DCPO announced agreement to issue the 'Notice to Proceed' with Phase II funds on Friday May 13, Phase I funds having been allocated up completion of foundations work. (see DCPO letter of 4 May 1989 from John Messervey, Project Manager).

Central shear walls were poured on April 8, 1988 ... steel to start approximately April 19, 1988 (see HSI Construction Progress Meeting No. 27 notes, dated April 13, 1988).

Construction of foundation walls progressed. Structural steel erection commenced on April 21, 1988 (see HSI Construction Progress Meeting No. 29 notes, dated April 27, 1988).

[85013.03/A1082489]

[DIAGRAMS: See Joint Appendix at pp.260-265]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN BUCKLEY

I, John Buckley, hereby depose and say that:

1. From April of 1970 to January of 1981 I was the Sheriff of Middlesex County. As Sheriff, I oversaw both the Jail and the House of Correction at Billerica, Massachusetts. The population of the Jail ranged from 75 to 125 and the population of the House of Correction, from 200 to 300.

2. I have also served as an expert witness or consultant in numerous jail and prison cases, including many conditions law suits. I have been a consultant on cases involving correctional condition suits in Hampden,

Worcester and Norfolk county Jail and House of Corrections in the Commonwealth.

3. I have been involved with the Charles Street Jail for 22 years. I first became involved as the Executive Director of the New England Citizens Crime Commission in 1967. Later I was involved as the Executive Director of the Massachusetts Council of Crime and Correction, which was part of the National Council on Crime and Delinquency, which did a study of the jail in 1968-69. Later, as a friend of the court, I assisted Judge Garrity in the search for alternative locations for the jail. Finally, I have been involved as an expert witness for the plaintiffs in Inmates of the Suffolk County Jail v. Kearney, C.A. No. 71-162-K, and have consulted with plaintiffs' architectural

expert Elliot Rothman with respect to the design of the new facility.

4. My resume is attached hereto and sets forth other experience I have in the area of corrections.

5. I have reviewed the motion of the Sheriff of Suffolk County to modify the consent decree and the supporting documents. I viewed the new Suffolk County Jail on June 27, 1989.

6. The architectural program for the new Jail is based on the standards of the American Correctional Association (ACA): Standards for Adult Local Detention Facilities, Second Edition, April 1981, Sec. 2-5110. Both the architectural program, which is incorporated in the Consent Decree, and the ACA Standards require single cell occupancy for pre-trial detainees.

7. The cells in the new Jail are designed for single cell occupancy and give maximum privacy to each detainee. Unlike the barred cells of the old Jail, through which every movement could be observed, the doors in the new facility are solid with only a small sealed window which measures 5 3/8" x 33 7/8". The wash bowl and toilet are arranged at an angle facing away from the door for greater privacy. Each cell has an outside window which is also sealed and cannot be opened. These aspects of the design of the cells that allow the detainee greater privacy would not only be lost in a double celling arrangement, but would, in fact, create a more dangerous situation for the detainees.

8. Because each cell is hermetically sealed, inmates locked in

effectively cannot communicate with the officer who is likely to be at the control station. If there is a fight or any kind of problem, the inmate would have to signal from within by kicking the door, pounding the enclosed window in the door, or waving at the closed window. Yelling would probably not be heard. Thus, the safety of any double-celled inmate could not be insured. If an officer is to be aware of any problem, he would have to be very close to the cell door rather than being able to view it from the control station. Safety of the inmates would require continuous viewing by an officer actually looking in the windows of the doors during the hours that detainees are locked in their cells.

9. The cells in the old Jail have 80 square feet of space. The cells in

the new facility contain only 69.59 square feet in their entirety. When one subtracts from the floor space the area taken by one bed, shelf, toilet, and sink, the actual amount of floor space - or moving around space - is 39.46 square feet. As Judge Garrity said of the cells in the old Jail in 1973, "It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal friction." The cells in the new Jail are even smaller.

10. I spent some time in one of the cells in the new Jail. At first I was alone and was in the cell for almost 60 minutes. Given that it is a sealed room, I felt that it would be difficult to get the officer's attention if I needed to

communicate with him while I was locked in the cell. Although the Sheriff states that there would be considerable out of cell time, detainees, according to the Sheriff, would be locked in their cells for 12 hours per day. Later, I spent 45 minutes in a cell with plaintiffs' architect Elliot Rothman. After about 45 minutes in such a small space, I felt the "closeness" of the quarters and that we were intruding on each other's space.

11. The only description of the classification program the Sheriff intends to use is found at tab #39 of the Appendix. It is an article, "Jail Classification and Discipline," published by the National Sheriff's Association.¹

¹ However, on the title page the Sheriff's Association states that the article does "not necessarily represent the official position or policies" of the National Sheriffs' Association.

In the most general terms, the author, Marilyn B. Ayres, describes classification procedures. She offers little, if anything, in the way of concrete proposals or procedures. For example, it says that violent detainees should be identified because of the risk they pose to others. Id. at 34.

However, she does not say how such dangerousness can be detected. She also recommends that the officers be "highly skilled in problem identification ... and be able to determine passiveness and vulnerability as well as aggressiveness and belligerence." Id. at 35. Again, she does not indicate how the officers should be trained to achieve this goal.

12. Under the Sheriff's proposal, 400 men would be double bunked. I do not believe that any classification system

would be effective in preventing the very real possibility of assaultive or sexually abusive behavior between two men double bunked in one of these cells. It is my opinion that double bunking 200 of the cells at the new Suffolk County Jail, despite the attempts at classification, will lead to a substantial likelihood of violent behavior. Pre-trial detainees are the most difficult individuals to keep in custody. They experience much greater tension than sentenced inmates. These tensions are a result of their unexpected arrest and incarceration, their inability to communicate with their family and friends, and their not knowing how long they will be held in custody, whether they can raise the money for bail, when they will be tried, what is happening to their families and their

possessions or what the outcome of their trial will be. Frequently, there is very little in the way of background information available to the Sheriff with respect to the detainees. In addition, there is much greater turn over with pre-trial detainees which means that it is harder to assess a constantly changing population. At the Charles Street Jail according to the Sheriff's figures, fifty percent of the detainees are released within eight days. Each of these factors makes meaningful classification extremely difficult.

13. I believe that the combination of isolation, inability to communicate, and tension caused by having two inmates in a cell designed for one will produce serious problems for the safety of the inmates and ultimately for the

Correctional officers and Sheriff's staff.

14. A new jail, like a newly launched ship, needs a breaking-in period of six to twelve months. Officers need to familiarize themselves with the new facility, noise levels have to be determined, use of restricted areas, visitors, kitchen use, problems with automatic doors, elevators, stairwells, plumbing cabinets, and air and heat flow all need to be worked out. To open this or any other facility with more inmates that its design capacity would be irresponsible. The results could be tragic for officers and inmates alike.

/s/
John Buckley

[Jurat Clause Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

SUPPLEMENTAL AFFIDAVIT OF
ROBERT C. RUFO
SHERIFF OF SUFFOLK COUNTY

Now comes Robert C. Rufo on oath and
says:

1. I am Robert C. Rufo the Sheriff
of Suffolk County.

2. This affidavit supplements my
previously filed affidavit in support of
my motion to modify the consent decree
entered in this case.

3. I have toured the new Suffolk
County Jail at Nashua Street on over
fifty (50) occasions, including all the
housing units. The housing units are
complete, except in some units for
installation of flooring material outside
of the cells (cells will have concrete
floors), appliances in the kitchenette

and laundry area and the officers' station (a counter and desk behind which an officer sits).

4. After careful consideration of the double-bunking plan described in my previously filed affidavit and the number of inmates committed to my custody who are subject to administrative or disciplinary discipline, I have concluded that the thirty four (34) cells in the administrative segregation area should be used for regular male housing. Inmates subject to administrative segregation would be housed in the same thirty two (32) cell unit previously designated for disciplinary segregation.

5. This change will increase the number of regular male holding cells to 316, reduce the number of double-bunked

cells to 197 and leave 119 regular male holding cells for single occupancy.

6. The regular male housing units would be utilized as follows:

<u>Unit</u>	<u>Number of Cells</u>	<u>Number of inmates if double-bunked</u>	<u>Number of Double bunked Cells</u>	<u>Square* feet in common area** accessible to inmates</u>	<u>Square feet per inmate in common area</u>
2 South	34	53	19	2040	38.49
2 West	38	70	30	2703	38.61
2 North	38	70	30	2703	38.61
2 East	34	53	19	2040	38.49
4 West	36	65	19	2486	38.25
4 South	34	53	19	2040	38.49
4 East	34	53	19	2040	38.49
4 North	34	53	19	2040	38.49
6 East	<u>34</u>	<u>53</u>	<u>19</u>	2040	38.49
	316	513	197		

* See separately filed Affidavit of David Tenney for calculations of these square footages.

** The common area square footage includes the day room, multipurpose ("quiet") room, exercise room.

7. The above plan would exceed the thirty five (35) square feet of day room space per inmate recommended by ACA standard for Adult Local Detention Facilities 2-5144.

8. The special needs cells, except for the changes stated, will continue to be used for their special purposes:

Protective custody	8
Classification	35
Medical	22
Administrative/ Disciplinary Segregation	32

9. In addition there is a forty (40) cell housing unit for female inmates.

10. All inmates in the regular housing units would be allowed out of their cells, except for an eight hour sleep period and four one hour periods dispersed throughout the day for inmate counts, security checks, staff relief and shift changes.

11. No inmate would be double-bunked except in accord with the Suffolk County Sheriff's Department Classification Program. (See below.)

12. During the day and evening shifts two jail officers would be assigned to each housing unit. During the night shift, midnight to eight a.m., one jail officer would be assigned to each housing unit. During all shifts, a supervisor will be in the control room and will have two housing units under his observation and control. During all

shifts an Emergency Response Team ("ERT") will be available. Members of the ERT will respond in pairs to any emergency in a housing unit.

13. During any time when inmates are locked in their cells, each double-bunked cell will be checked at irregular intervals.

14. The Bail Appeal Project, providing for automatic Superior Court bail reviews of pretrial detainees committed to the Sheriff's custody, will be continued as part of the comprehensive Program Services Legal and Social Services Division.

15. The Pretrial Controlled Release Program would also continue. (See separately filed Affidavit of Paul McGill.)

16. Attached hereto and incorporated herein as Exhibit A is the fire safety and evacuation for plan inmate housing units at the Nashua Street Jail. This plan will be subject to further refinement as the transition to the new jail is completed.

17. Before being implemented at the Nashua Street Jail, the fire safety and evacuation plans will be reviewed and approved by both the Boston Fire Department and former Fire Commissioner of the City of Boston, George Paul, who has been retained by the Sheriff's Department. Thereafter the plan will be subject to annual review and approval by the Boston Fire Department.

18. In all cells each inmate will be provided with a fire resistant steel locker to hold his or her belongings.

The steel lockers will be designed to be stored beneath the lower bunk. Inmates will be required to keep all their personal belongings in their lockers.

19. Each inmate would also be allowed the use of a radio with earphones in the cell.

20. Noncombustible ashtrays and refuse containers will be used in each housing unit.

21. Each housing unit will be inspected daily by jail officers assigned to the unit to insure that inmates are storing their personal belongings in their steel lockers, the refuse container has been emptied, and no combustible material has accumulated in the unit.

22. The Nashua Street Jail will also be subject to an annual inspection by the Boston Fire Department.

23. I have appointed Officer James Coppi of my Department as the fire safety officer for the Nashua Street Jail. Officer Coppi has eight years experience and training as a firefighter in the United States Air Force. Officer Coppi has also attended the firefighting school conducted by the Boston Fire Department for Suffolk County Jail personnel. Officer Coppi will conduct weekly inspections of each housing unit to assure compliance with fire safety standards.

24. In each double-bunked cell there will be two flame retardant mattresses, as approved by the Boston Fire Department, two pillows, two blankets, two sheets, two wash cloths, two hand towels.

25. In each housing unit there will be two fire extinguishers and a fire hose connected to a standpipe.

26. The Control Room, which serves two housing units on each level, has electronic control over all housing unit cell doors, including simultaneous emergency release of all the cell doors. Each Control Room will also hold two "Scott Air Packs" - self-contained breathing apparatus - for use by Jail staff.

27. Each jail officer on a housing unit will have a key to open all cell doors in that unit. A spare key for the cells in each unit will be in the Control Room for that unit and in the Central Control Room. The Central Control room is located on the first floor of the building and contains the fire

annunciator board and has control over the building's elevators and emergency stairways.

28. Inmates wear Jail issued outer clothing. Their personal clothing is kept in the Jail property room and is available for inmate court appearances. Inmates are allowed to keep some underwear and a pair of shoes or sneakers in their cells.

29. When out of their cells inmates will have access to the dayroom, separate multipurpose ("quiet") room and exercise areas. Inmates will have access on a scheduled basis, weather permitting, to the outdoor recreation deck. Each recreation deck services two housing units, and the inmates from one unit at a time will have access to the recreation deck.

30. Inmates will be allowed access to the showers on the housing unit except during lock down time.

31. During those times when inmates are confined to their cells, it will be standard procedure to have the day room television turned off and the intercom in the Housing Unit Control Room turned on. This will allow the officer in the Housing Unit Control Room to monitor the unit and its cells.

32. I have personally inspected dozens of cells at the Nashua Street Jail, including looking from the outside into the cell through the window in the cell door. By simply turning one's head it is possible to view all of the cell's interior.

33. When checking a cell during lock down time a jail officer is required

to confirm the presence of each inmate in the cell. Each cell has a night light turned on and off by the jail officer from outside the cell for this purpose.

34. A copy of the classification program for the Nashua Street Jail is attached hereto and incorporated herein as Exhibit B.

35. By state statute, no juveniles are held by the Suffolk County Sheriff's Department.

36. One of the goals of the classification program is to determine if an inmate is suitable for double-bunking.

37. Under the classification program, inmates are evaluated based upon information gathered from: present court records, probation records, Suffolk County Jail records, the booking questionnaire, medical records,

observations of the booking officer, observations of jail officers, interviews with case workers, nurse's interview and physical examination.

38. My department is in the process of completing development with Honeywell/Bull of a computerized inmate tracking system (which will indicate an inmate's housing assignment and present location at any given time, e.g. court, social services, infirmary, etc.). There will also be an inmate database containing information on: prior Suffolk County Jail admissions, prior charges, known aliases, disciplinary record social services record and medical history. This computer system will be used in the classification process to store and exchange information. As this system is completed and implemented at the Nashua

Street Jail, the classification program will be subject to further refinement.

39. Inmates who, based upon available information, meet any of the following criteria will not be suitable for double-bunking: a prior history of violent or assaultive behavior against other inmates, past or present charges of rape or sexual assault, any indication of mental illness, under the influence of our undergoing withdrawal from drugs, and medical illness or problems that may result in increased tension between cell mates.

40. Further, the shift commander on any shift will have the authority to remove an inmate from double-bunking, if in his judgment there may be a threat to inmate or staff safety. Also, all Jail personnel are required to report to the

Classification Director any incident or information which may affect an inmate's classification status, including his suitability for double-bunking.

41. Inmates will not be moved to the Nashua Street Jail until the building has been thoroughly tested and "shakedown", and I am satisfied that all systems affecting inmate and staff safety and the security of the facility are functioning properly.

42. Inmates will not be double-bunked at the Nashua Street Jail until the Jail staff are thoroughly familiar with all of the facility's systems and have had thirty (30) days experience operating the housing units with one inmate per cell and the Suffolk County Jail classification program has been implemented.

43. I was directly involved in drafting the legislation, Chapter 799 of the Acts of 1985. That act authorized the construction of a new Suffolk County Jail at Nashua Street at a cost of Fifty Four Million Dollars. The contract for the facility was awarded in September, 1986, and ground for this new facility was broken in September, 1987. By order of the Supreme Judicial Court the facility was to be completed by March 1, 1990.

44. I was the Executive Director of the Massachusetts Sheriffs Association ("MSA") for four years and its President since January, 1987. I have participated in the MSA's effort to obtain funds for county corrections. During the period from 1986 to 1990, in addition to the construction of new facilities for the

Commonwealth's Department of Correction, the Commonwealth has also undertaken the financing of new jails and houses of correction for the Suffolk County House of Correction, and jails and houses of correction for Bristol, Norfolk and Essex Counties.

45. Contrary to the assertion of the plaintiff/inmates, it would have been impossible to change the design of the Nashua Street Jail once the legislation had passed on January 10, 1986. This would have resulted in a further delay in opening a new jail (a delay which, no doubt, the plaintiff/inmates would have opposed) and would have required additional funds from the Commonwealth at a time when hundreds of millions were already being spent for state and county correctional facilities. In these

circumstances, given a choice between the certainty of a new facility and further delay and additional expense to the public, as a responsible public official, I chose the new facility, which will be the most modern in the state, one of the most modern in the country and will meet all constitutional standards.

46. On numerous occasions, beginning in June, 1987, I have written to and met with the Secretary of the Executive Office of Human Services of the Commonwealth, which controls funding for correctional facilities, advising the Secretary of the need for additional jail cells in Suffolk County and proposing the creation of a regional "lock-up" for Suffolk County. A regional lock-up facility would replace police lock-ups in the County and hold prearraignment and

pretrial detainees. Because of continuing budget constraints, funding for such a facility has not been forthcoming.

47. I have visited and toured all of the jails in Massachusetts and the correctional institutions of the Commonwealth where Suffolk County pretrial detainees have been and are being held.

48. In all of these institutions Suffolk County inmates are held in facilities which are substantially inferior to the Nashua Street Jail in terms of the quality of the conditions in which inmates are held and the range of services offered to them - social, medical, educational.

49. All Suffolk County inmates held outside of the County are held in double-bunked cells, some as small as forty-eight (48) square feet.

50. Also, inmates held outside of Suffolk County are further away from their attorney, family and friends.

51. Without the option of double-bunking a portion of the Nashua Street Jail, as Sheriff of Suffolk County I would be left with only two choices: to continue to send Suffolk County inmates to inferior county and state facilities or to prematurely release inmates who are being held on bail to the streets.

52. Persons committed to my custody are typically charged with serious felonies. For example (see Tab 42 of the previously filed affidavits and documents) in 1988 29.1% of the

commitments were for crimes against the person and 21.2% for possession of drugs with intent to distribute.

53. Persons committed to my custody also have the benefit of the Bail Appeal Project which provides for bail review in the Superior Court by attorneys from the Legal Division of the Suffolk County Sheriff's Department. This insures that all inmates, either through their own counsel or the Bail Appeal Project, will have had their bail reviewed by two judges, the judge of the District Court, who initially set bail, and the Superior Court judge who reviewed it.

54. All inmates also have the benefit of the Suffolk County Pretrial Controlled Release Program. (See separately file Affidavit of Paul McGill.) Under this program inmates who

have had bail set in the District Court are recommended to be transferred to a halfway house or released on recognizance to the Boston Employment Resource Center or the Boston Day Reporting Center.

55. Given the existence of the Bail Appeal Project and the Pretrial Controlled Release Program, the only inmates who would be available for transfer to a facility outside of Suffolk County or for release to the street are inmates who have at least twice had their bails reviewed and who have been found unsuitable for inclusion in the Pretrial Controlled Release Program by an Associate Justice of the Superior Court.

56. It is my opinion that such inmates, if released to the street, would pose an unreasonable and significant

threat to public safety and a significant risk of their not appearing at trial.

57. The alternative to double-bunking is to have such inmates transferred to facilities outside of the County, where they would be held in double-bunked conditions that are inferior to those at the Nashua Street Jail. Also, county and state correctional facilities continue to operate at an increasing percentage of their capacities.

58. In fiscal year 1989 approximately \$799,989.00 was expended to transport Suffolk County inmates to other state and county facilities and in fiscal year 1990 expenditures to date have been approximately \$972,029.00. These funds would be significantly reduced, if

double-bunking were permitted at the Nashua Street Jail.

59. At present the four elevators at the Nashua Street jail have been assigned as follows: one for visitors, one for service, one for staff and one for inmates. The impact, if any, of double-bunking at the Nashua Street Jail on the buildings's elevators will be accommodated by scheduling their use and utilizing the staff elevator for inmate movement.

60. The impact, if any, of double-bunking at the Nashua Street jail on the buildings's laundry and kitchen will be accommodated by extending the hours of their operations.

61. I have read the foregoing affidavit and the statements contained

therein are true and are based upon
personal knowledge.

/s/

[Jurat Clause Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

SHERIFF OF SUFFOLK COUNTY'S
PROPOSED ORDER

Now comes the Sheriff of Suffolk
County and respectfully submits the
attached proposed order.

Respectfully submitted
SHERIFF OF SUFFOLK COUNTY
By his attorney,

/s/
Chester A. Janiak
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

[Certificate of Service
omitted in printing]

Date: January 8, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

ORDER

The Sheriff's Motion for
Modification of Consent Decree having
come on for hearing and having been heard
it is ordered and adjudged:

1. The Consent Decree is modified
as set forth in this Order.

2. The number of cells set forth
below in the following housing units may
be double-bunked:

<u>Unit</u>	<u>Number of cells</u>	<u>Number of double double-bunked cells</u>
2 South	34	19
2 West	38	30
2 North	38	30
2 East	34	19
4 West	36	19
4 South	34	19

4 East	34	19
4 North	34	19
6 East	<u>34</u>	<u>19</u>
	316	197

3. Double-bunking will occur only when the Sheriff concludes that he cannot hold all the inmates committed to his custody and maintain single-occupancy at the Nashua Street Jail.

4. Double-bunked inmates will be permitted out of their cells, except for an eight hour sleep period and for four one hour periods during the day when inmate counts, security checks and shift changes are occurring.

5. Inmates will be selected for double-bunking in accord with the classification program filed with the Court.

6. Housing units that are double-bunked will have two officers assigned to the unit on the day and evening shifts and one officer on the midnight to eight shift. The Housing Unit Control Room will be manned at all times.

7. "Special needs" cells, classification, infirmary, protective custody, administrative/disciplinary segregation, will be used only for their designated purposes.

Date

District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES E. MURPHY

I, James E. Murphy, hereby depose
and say that:

1. I, James E. Murphy, during over
twenty years with the Federal Bureau of
Prisons, worked as a correctional
officer, classification officer,
associate warden and warden in four
facilities ranging in size from 300 beds
to 1,000 beds and while on the staff of
the central office of the Bureau of
Prisons, visited and inspected nearly all
federal facilities. During six years
with the U.S. Marshals Service, I
developed and assisted in the monitoring
of the program by which the Marshals
Service contract with some 750 local

jails in the United States for confinement of federal prisoners.

2. My resume is attached hereto and includes a complete description of my experience.

3. I have reviewed the following in connection with this case:

- a. The Consent Decree of May 7, 1979;
- b. Max Stern's May 23, 1989 letter to the Sheriff's lawyer, Chester Janiak;
- c. The Sheriff's motion to modify the Consent Decree to be allowed to double bunk in 200 cells in the new jail;
- d. The Sheriff's memorandum of law in support of his motion;

- e. The Appendix of Affidavits of the Sheriff in support of his motion;
- f. Plaintiff's memorandum in opposition to the Sheriff's motion and plaintiffs' appendix in support of their opposition; and
- g. Additional affidavits filed by the Sheriff in January, 1990, including the Affidavit of Sigmund Fine.

4. Sigmund Fine writes at length in support of the Sheriff's request for double bunking in the new jail. Mr. Fine points to his experience as Assistant Warden at the Maryland State Penitentiary in Baltimore where 650 of 750 cells were double bunked. He states that he recalls no instances of murder of or by cell

mates or any greater violence between cell mates than among those who were not cell mates.

5. Mr. Fine neglects to mention, however, that the Maryland Penitentiary houses only sentenced prisoners and historically housed the longest term inmates in the Maryland Division of Correction. Therefore, Mr. Fine and his staff had weeks, months and even years to assess a prisoner's suitability for a double cell. At best, the Sheriff of Suffolk County will have only a few days.

6. Mr. Fine's experience -- at least in Maryland -- is not relevant to that of the Suffolk County Jail, where, according to statistics of the Suffolk County Sheriff's Department, there is a 75% turnover in inmates every two weeks.

7. In the operation of any jail, decisions are made by jail staff about jail inmates. The decision making processes may be extremely formal or may be informal and subjective. To provide a uniform basis of making program decisions concerning prisoners, classification systems for sentenced prisoners were developed many years ago. However, jail classification systems for pre-trial detainees in jails are of a much more recent origin.

8. Classification systems can usually be grouped into two basic categories: subjective and objective. The early classification systems and many currently used in jails are subjective; that is, they require assessments and clinical judgments by the person or persons making the classification

decision. In a subjective system, decision making is governed principally by broadly defined criteria relating to the jail's philosophy, the jail's physical design and the characteristics of the inmates. In order for a subjective classification system to work, the staff must be experienced and must know the inmates well. Otherwise, decisions on classification will not be reliable or consistent.

9. Objective systems, on the other hand, involve a more formalized approach to classification, emphasizing explicitness in decision making. In these systems the staff uses a standardized form such as a check list or scoring sheet to assess inmate custody and/or program needs. Completion of the form results in a recommendation

pertaining to custody designation and programming. The role of staff expertise and judgment is confined to agreement or disagreement with the recommendation. The two essential features of an objective classification system are reliability and validity. Validity means that the items being measured have some reasonable expectation of predicting a certain outcome. Reliability is the degree of consistency in classification. The methods and procedures used to classify inmates must be explicitly stated and consistently used in the classification of all inmates. Objective classification systems purposely limit discretionary decision making to insure uniformity in operations.

10. I have reviewed the Suffolk County Sheriff's Department Policy S-420,

which is the classification plan. (Tab B to Supplemental Affidavit of Robert C. Rufo, Sheriff of Suffolk County). It is my opinion that the system is a subjective one. It is very loosely written and has some significant deficiencies.

11. No time frame is set or even estimated during which the classification decision^r will be made. Only 35 cells are available in the intake unit so there are severe space constraints on the classification system which do not appear to have been recognized or taken into account in the plan.

12. There is no indication of the relationship between the classification categories (security, medical and social) and the classification levels (general, administrative segregation, escape risk,

disciplinary segregation, suicidal evaluation and medical). See p. 2-3 of the Plan. Similarly, there is no explanation how the scores referred to in the classification categories are calculated or the method for using the standards (at para. .07) in "calculating the final subjective and objective score." (para. 03, at p. 2, definition of "classification categories.")

13. There is also no mention of the number of staff people who will be involved in the classification process or the training that these staff people will receive. In addition, it is unclear whether the information needed by the staff to make decisions will, in fact, be available. It is my opinion that in a large jail such as Suffolk County's it is unlikely that staff will be familiar

enough with the inmates to provide a complete picture of the inmates' history. Without this, accurate subjective classification is not possible.

14. The role of the Special Classification Board in the Sheriff's plan is unclear and largely unspecified. The plan provides that the Board may be convened from time to time to review difficult or unusual cases or to resolve classification disputes. Changing membership on this Board, however, will make consistent decision making unlikely. This Board is supposed to establish sub-groupings within each classification level (p.6). But, there is no indication of the purpose or mandate of these subgroups.

15. I have more than 20 years as a correctional officer, classification

officer, associate warden and warden with single cells, double cells, eight-man cells, ten-man cells and dormitories housing as many as 100 inmates. I have had extensive experience with a variety of classification systems. It is my opinion that the classification system proposed by the Sheriff will not produce reliable and consistent results and will not achieve part of its purpose which is "ensur[ing] inmate safety." (See definition of "classification" as para. .03, p. 1). It is also my opinion that double bunking pretrial detainees at the new Suffolk County Jail as is proposed by the Sheriff would result in a greater likelihood of inmate-on-inmate violence.

 /s/
James E. Murphy

[Jurat Clause Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

SECOND AFFIDAVIT OF
ELLIOT PAUL ROTHMAN

I, Elliot Paul Rothman, hereby
depose and say that:

1. I have reviewed the additional
affidavits filed by the Sheriff in
support of his motion to modify the
Consent Decree to allow for double
bunking.

2. My letter and report of
February 21, 1990 to plaintiffs' counsel
which are attached hereto accurately set
forth my opinions.

/S/
Elliot Paul Rothman, AIA

[Jurat Clause Omitted in Printing]

[Rothman, Rothman
& Heineman
Architects, Inc.
Letterhead]

21 February 1990

Ms. Lynn Weissberg, Esq.
Stern and Shapiro
80 Boylston Street, Suite 910
Boston, MA 02116

Re: Suffolk County Jail: Affidavit of
Sigmund L. Fine 1/5/90
RRH Project No. 85013.03

Dear Ms. Weissberg:

I have reviewed the "Affidavit of Sigmund
L. Fine", dated 5 January 1990 and have
attached our detailed response. Three
major issues are raised by Mr. Fine's
response.

- 1). The single most important
architectural contribution of the
American Correctional Association
Standards, not already covered by
the Massachusetts State Building
Codes and health codes, is that of

cell size. Mr. Fine has inspected many facilities for compliance with American Correctional Association standards. Yet in his affidavit, he is willing to abandon the major criterion used for physical planning, the ratio of net square footage of cell area to individual inmate and reduce the standard from 70 net square feet per inmate, 10 square feet less than the cell size in the existing Charles Street Jail, to 35 net square feet per inmate.

- 2). Mr. Fine's affidavit is limited to addressing ACA standards. The final architectural program and Request for Proposal was not limited to ACA standards, although we find them valuable.

3). On Wednesday 31 January 1990, Sheriff John J. Buckley and I toured the Charles Street Jail in order to further observe actual sight lines from the central officers' station into the cells. Our conclusion is that an officer cannot observe directly into most cells when the cell doors are open; when closed there is almost no possibility of observation from the Central Control Station because of the privacy windows designed to enforce the privacy of one resident per room.

We shall be pleased to respond to any questions you may have.

Very truly yours,

/s/

Elliot P. Rothman, AIA

[85013.03/A1021990]

SUFFOLK COUNTY JAIL

Modular Cell Alternative to Double Bunking

Alternatives to double bunking are available on the Suffolk County Jail site. RRH adapted the modular housing units to the southern parking area that is located between the security fence and the concrete wall. This area is allocated to parking space and does not impact on access of service vehicles or inmate transfer to and from the Jail. A new door will be required at the fence into the secure vehicle loading area.

Four floor plans were explored to illustrate the ability of the Suffolk County Jail site to accommodate additional inmate rooms. The floor plans were adapted from the modular housing unit plans for units presently at the Charles Street Jail. (See "City of

Boston, Furnishing and Installing Modular Jail Cells Charles Street Jail Boston, Project No. 2403", Raymond L. Flynn, Mayor, Public Facilities Department, Design-Build Contractor Modular Correctional Systems Inc. 7/11/86, PP. A2, A4 and related drawings.) The height of a two tiered modular unit is 18'-10" to top of parapet and 27'-3" in one segment to top of the concrete perimeter wall. Access is restricted from the inner fence.

Under Scheme A 30 inmates can be housed in modular cells.

Under Scheme B 32 inmates can be housed in modular cells.

Under Scheme C 28 inmates can be housed in modular cells.

Under Scheme D 48 inmates can be housed in modular cells.

Illustrative Floor Plans are
attached.

Conclusions

We hope that we have responded to the question that Mr. Sigmund L. Fine has raised. Both of us want to see American Correctional Association's goals and standards implemented in jails throughout the country. We fail to understand how Mr. Fine, an expert in ACA standards could approve of a plan in which the most important standard, cell size per inmate, is violated.

[85013.03/A1021990]

[DIAGRAMS: See Joint Appendix at
pp.266-269]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

SECOND SUPPLEMENTAL AFFIDAVIT OF THE
SHERIFF OF SUFFOLK COUNTY IN SUPPORT
OF HIS MOTION TO MODIFY CONSENT DECREE

Now comes Robert C. Rufo on oath and
states:

1. I am Robert C. Rufo, the
Sheriff of Suffolk County, and I submit
this affidavit in further support of my
motion to modify the consent decree
entered in this case.

2. Attached hereto and
incorporated herein as Exhibit A is a
true and complete copy of the decision of
the State Building Code Appeals Board of
March 1, 1990, pertaining to the new
Suffolk County Jail at Nashua Street. As
is set forth in the decision, the State
Building Code Appeals Board has
determined the Suffolk County Jail at

Nashua Street can support an inmate capacity of 653.

3. Attached hereto and incorporated herein as Exhibit B is a true and complete copy of the Certificate of Occupancy issued for the new Suffolk County Jail at Nashua Street on March 1, 1990, which sets forth the inmate capacity of the facility as 653 inmates.

4. Attached hereto and incorporated herein as Exhibit C are true and complete copies of the waivers which have been issued to the Suffolk County Sheriff's Department for the double-bunked operation of the new Suffolk County Jail at Nashua Street with the existing shower facilities.

5. I have read the foregoing affidavit and the statements contained

therein are true and are based upon
personal knowledge.

 /s/
Robert C. Rufo

[Jurat Clause Omitted in Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

STIPULATION

Plaintiffs and defendant Sheriff of
Suffolk County stipulate as follows.

1. The average number of pre-trial
male commitments to the Sheriff of
Suffolk County for the years 1985-1990 is
set forth in the table attached hereto as
Exhibit A.

2. The male housing capacity of
the Suffolk County Jail at Charles Street
and under various proposals for the

Nashua Street Jail is set forth in
Exhibit B attached hereto.

For the Plaintiffs: For the Defendant
Sheriff:

<u>/s/</u>	<u>/s/</u>
Lynn Weissberg	Chester A. Janiak
Stern & Shapiro	Burns & Levinson
80 Boylston Street	50 Milk Street
Boston, MA 02116	Boston, MA 02109
Dated: March 16, 1990	

Average Number of Pre-Trial Male
Commitments to Suffolk County Sheriff
1985-1990

	1985	1986	1987	1988	1989	1990
January	319	349	350	385	464	372
February	308	332	350	380	482	370
March	321	333	369	401	404	
April	343	315	367	393	363	
May	315	296	369	387	354	
June	284	280*	361	377	392	
July	300	301	369	416	401	
August	326	313	371	458	410	
September	352	340	395	448	414	
October	352	333	376	442	429	
November	342	331	379	439	402	
December	344	331	385	430	384	
Yearly Average	326	321	370	413	408	

*3 days unavailable

Male Housing Capacity -
Suffolk County Jail

Charles Street Jail

(Single cell occupancy
including 5 cells designated
for medical/protective custody)
Total: 342

Nashua Street Jail

1. Design capacity (single cell occupancy)	
regular male housing ¹	316
pre-classification holding	35
administrative/disciplinary segregation ("seg.")	32
protective custody ("p.c.")	8
medical ("med.")	<u>22</u>
Total:	413

¹ The jail was originally designed to have 282 regular male housing units. See Rufo Aff. at para. 9. However, the Sheriff has now increased the number of regular male housing cells to 316 by converting 34 of the administrative and disciplinary segregations cells into regular male housing. See Supp. Rufo Aff. at para. 4-6.

- | | | |
|----|--|------------|
| 2. | Inmates' Proposal (single cell occupancy) | |
| | 100% use of seg., p.c., and med. cells | |
| | 413 with modulars ² | <u>48</u> |
| | Total: | 461 |
| 3. | Inmates Proposal (single cell occupancy) | |
| | 75% use of seg., p.c., and med. cells ³ | 389 |
| | with modulars | <u>48</u> |
| | Total: | 437 |
| 4. | Sheriff's Proposal | |
| | single cell occupancy at 100% use | 413 |
| | double bunking in 197 cells | <u>197</u> |
| | Total: | 610 |

² See Rothman Rept. 2 at 14 (P. App. II-A).

³ This assumes 100% use of 316 regular male housing cells and 75% use of the segregation, protective custody and medical cells.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Caption Omitted in Printing]

MOTION OF THE SHERIFF OF
SUFFOLK COUNTY FOR
MODIFICATION OF CONSENT DECREE

Now comes the Sheriff of Suffolk County and moves this Honorable Court pursuant to Federal Rule of Civil Procedure 60(b)(5) and (6) for a modification of the Consent Decree entered into between the parties in this case April 9, 1979, to the extent of permitting the Sheriff to house two pretrial detainees per cell in two hundred (200) of the two hundred eighty-two (282) regular male housing cells in the new Suffolk County Jail now under construction on Nashua Street and scheduled for occupancy in March, 1990.

As grounds for this motion the Sheriff states that since the Consent Decree was entered into:

1. There has been a substantial and material change in the applicable law - Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979) - and operative facts - continuing increases in the Suffolk County pretrial detainee population.

2. The proposed modification would meet constitutional standards with respect to the conditions of confinement of pretrial detainees and is compatible with achieving the overall purpose of the Consent Decree of confining Suffolk County pretrial detainees in conditions which meet constitutional standards.

For further grounds in support of this motion the Sheriff of Suffolk County

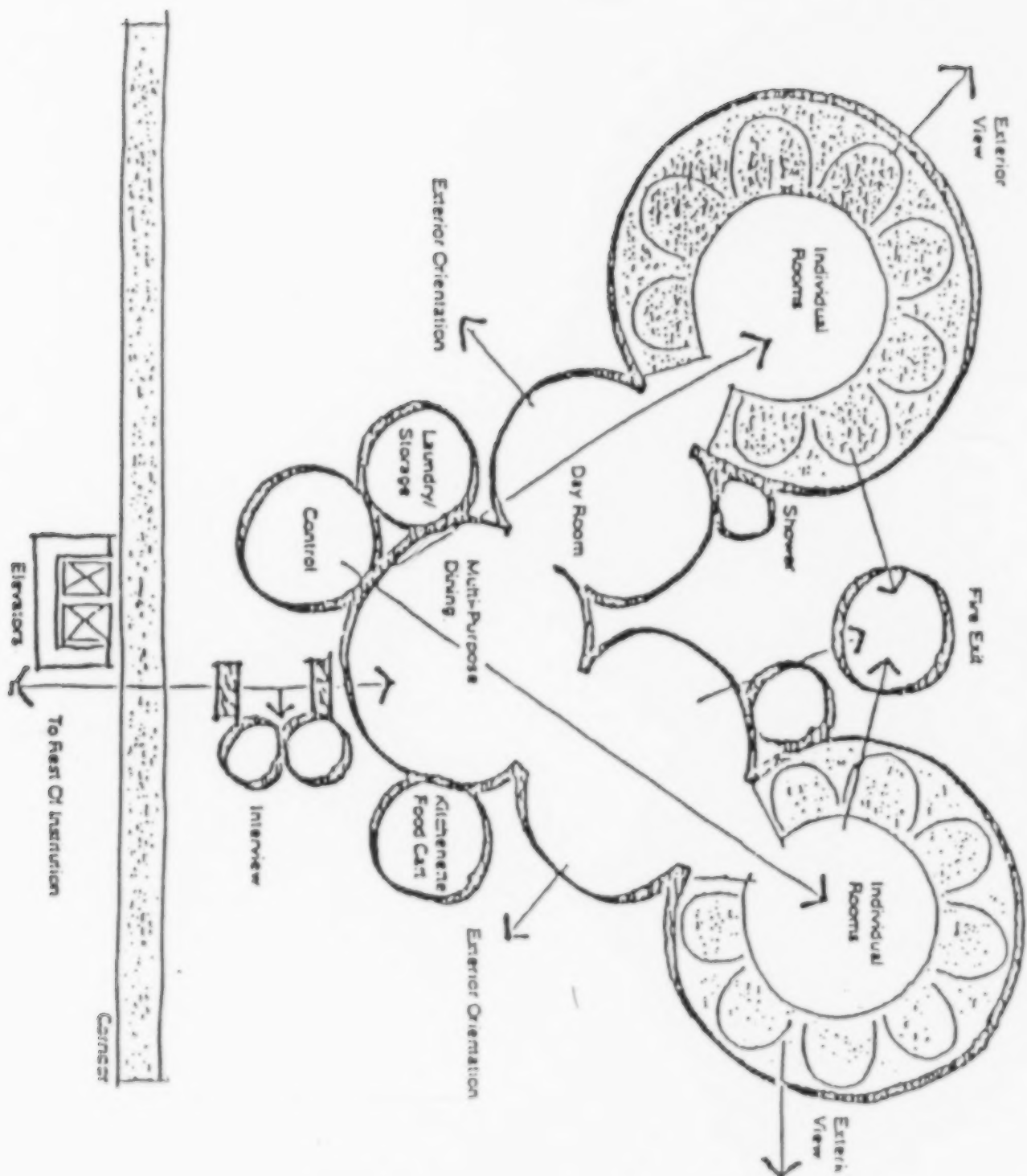
relies upon his memorandum of law filed
herewith.

Respectfully submitted/
SHERIFF OF SUFFOLK COUNTY
By his attorney,

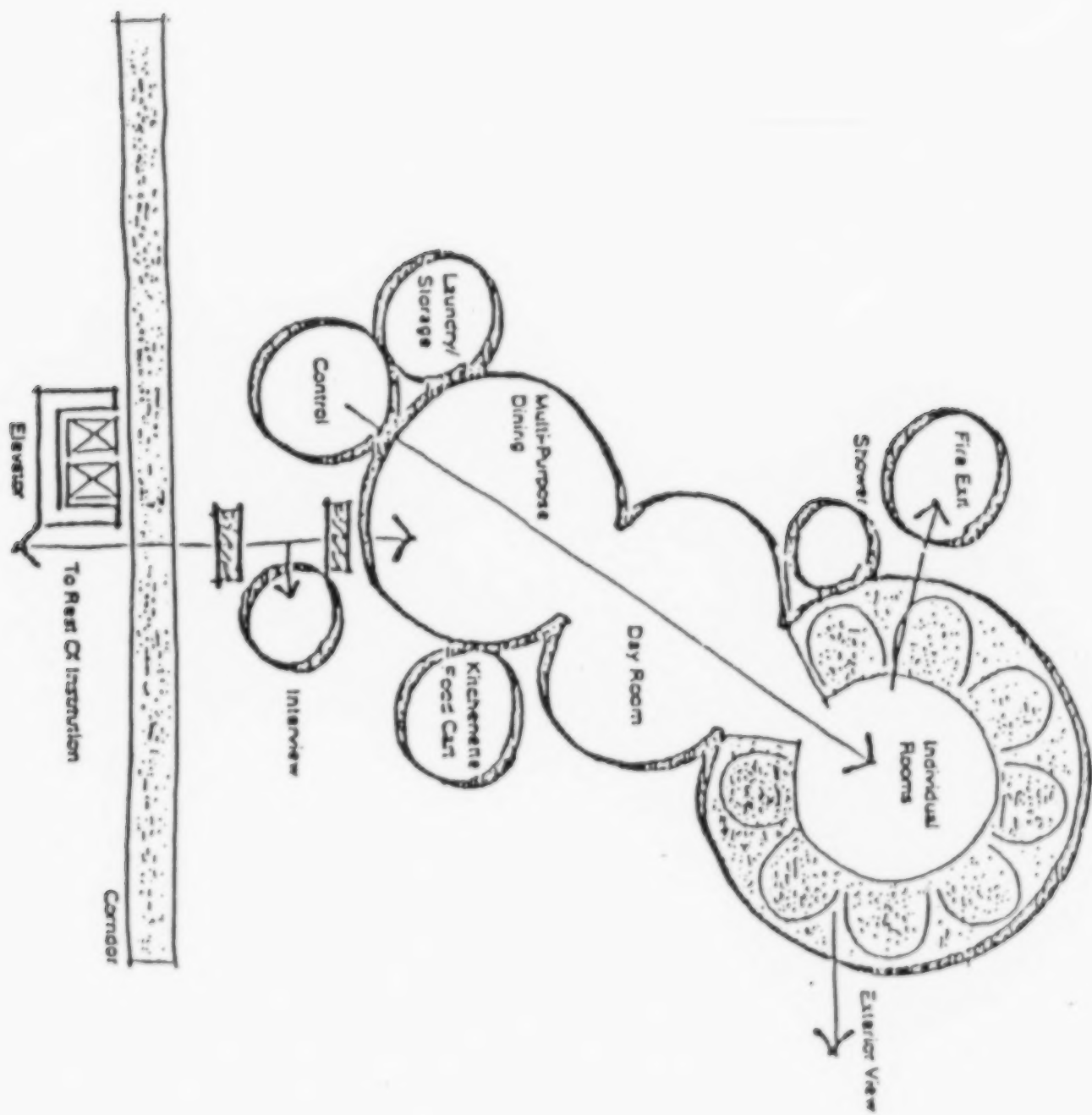
/S/

Chester A. Janiak
BBO #250340
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

Typical Housing Unit - Male



Typical Housing Unit—Female

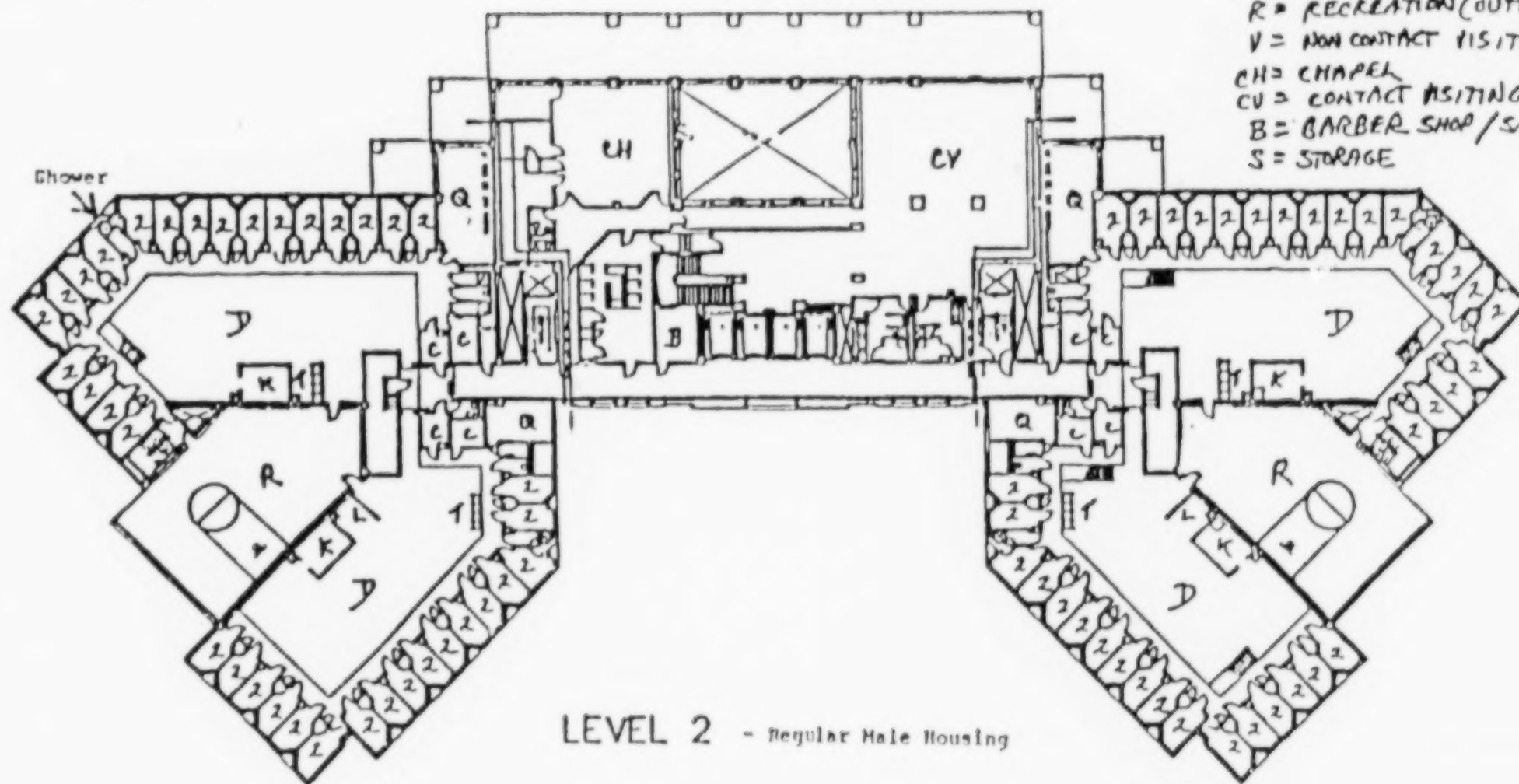


All cells are marked
"1" or "2" indicated
single or double
occupancy

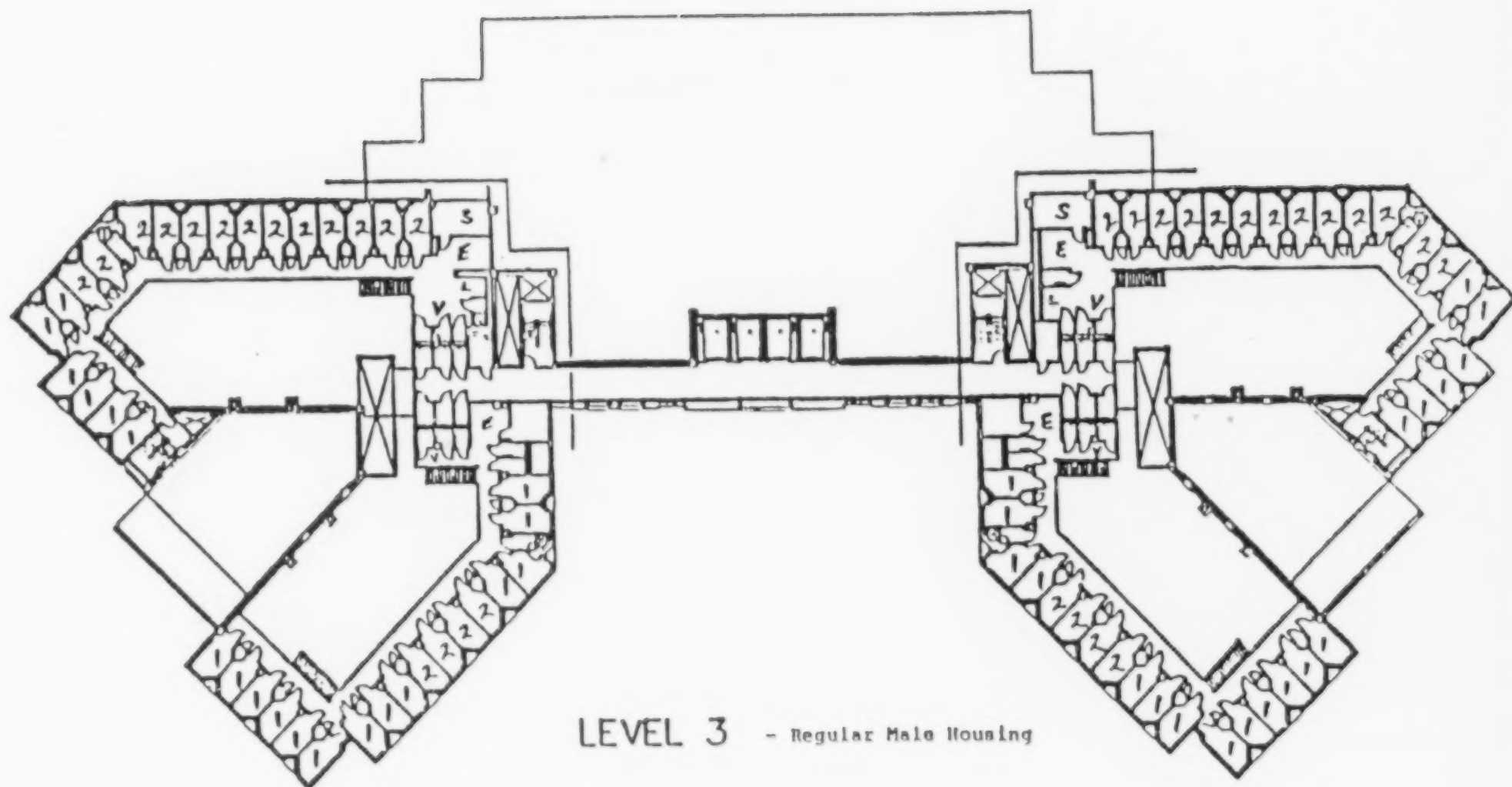
DOUBLE BUNKING CONFIGURATION

Scale: 1"=30'

D = DAYROOM
K = KITCHENETTE
Q = QUIET ROOM
T = TELEPHONES
C = COUNSELING/ATTY.
L = LAUNDRY
R = RECREATION (OUTDOOR)
V = NON CONTACT VISITING
CH = CHAPEL
CV = CONTACT VISITING
B = BARBER SHOP/SHAVE
S = STORAGE

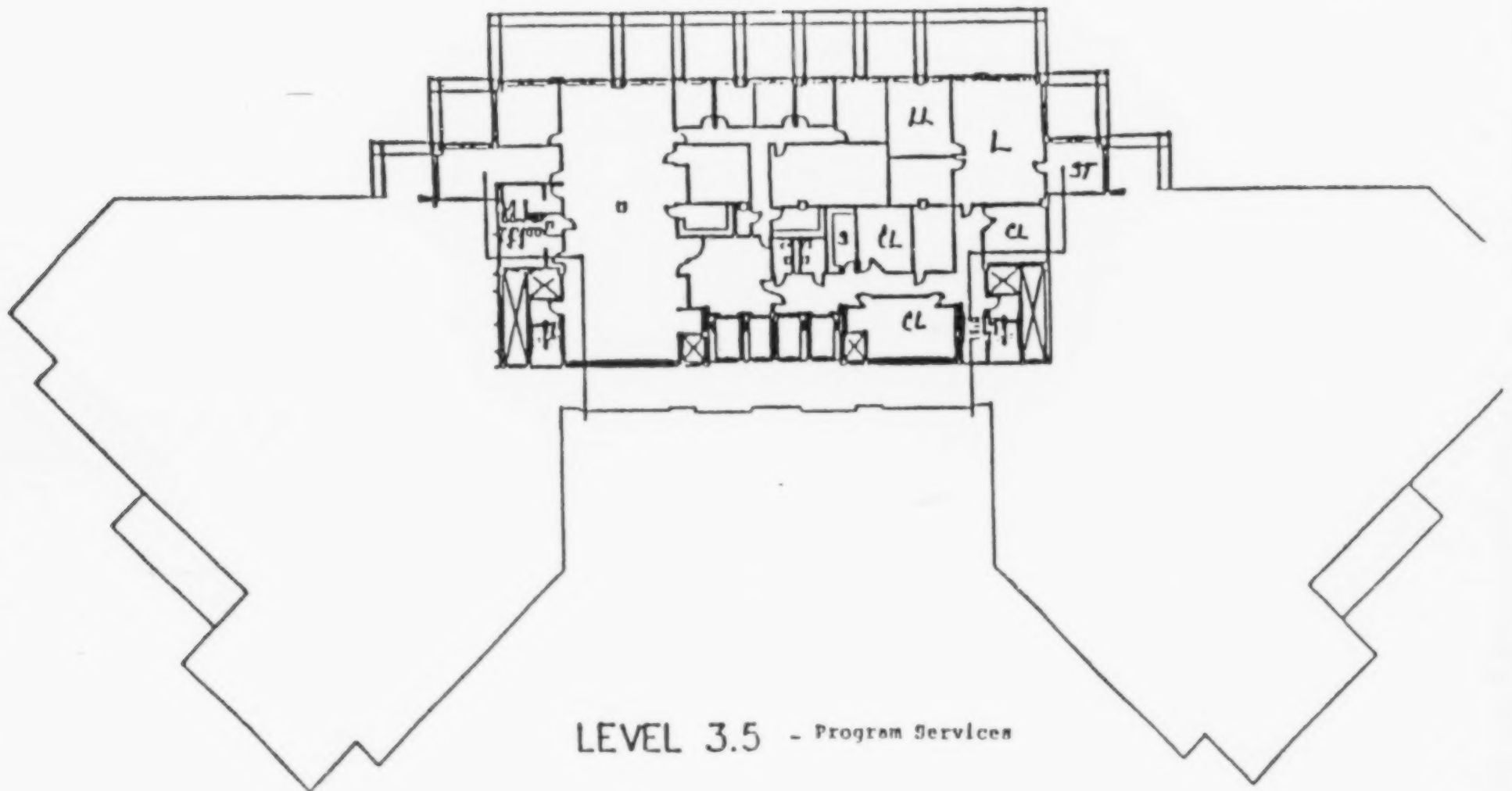


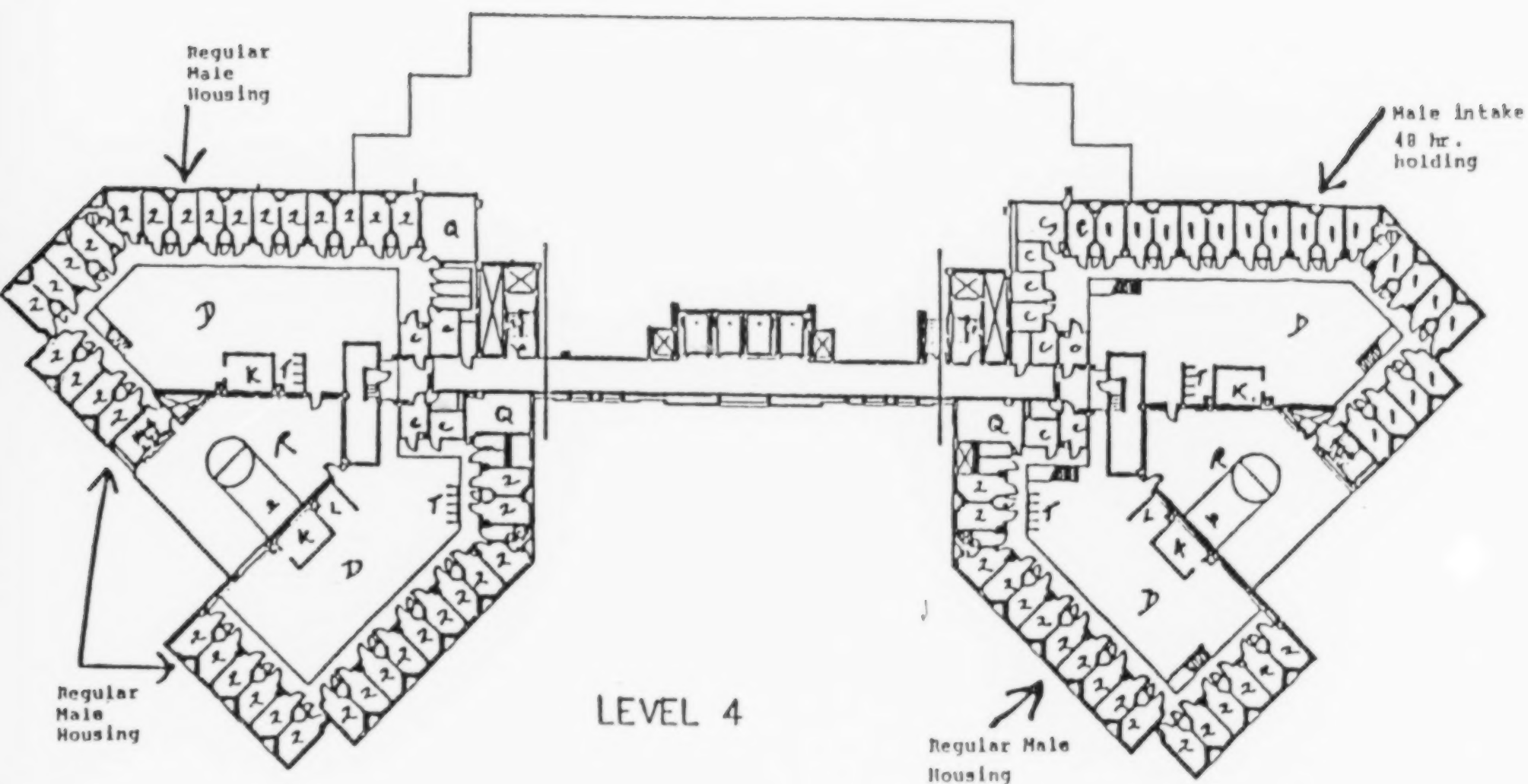
LEVEL 2 - Regular Male Housing

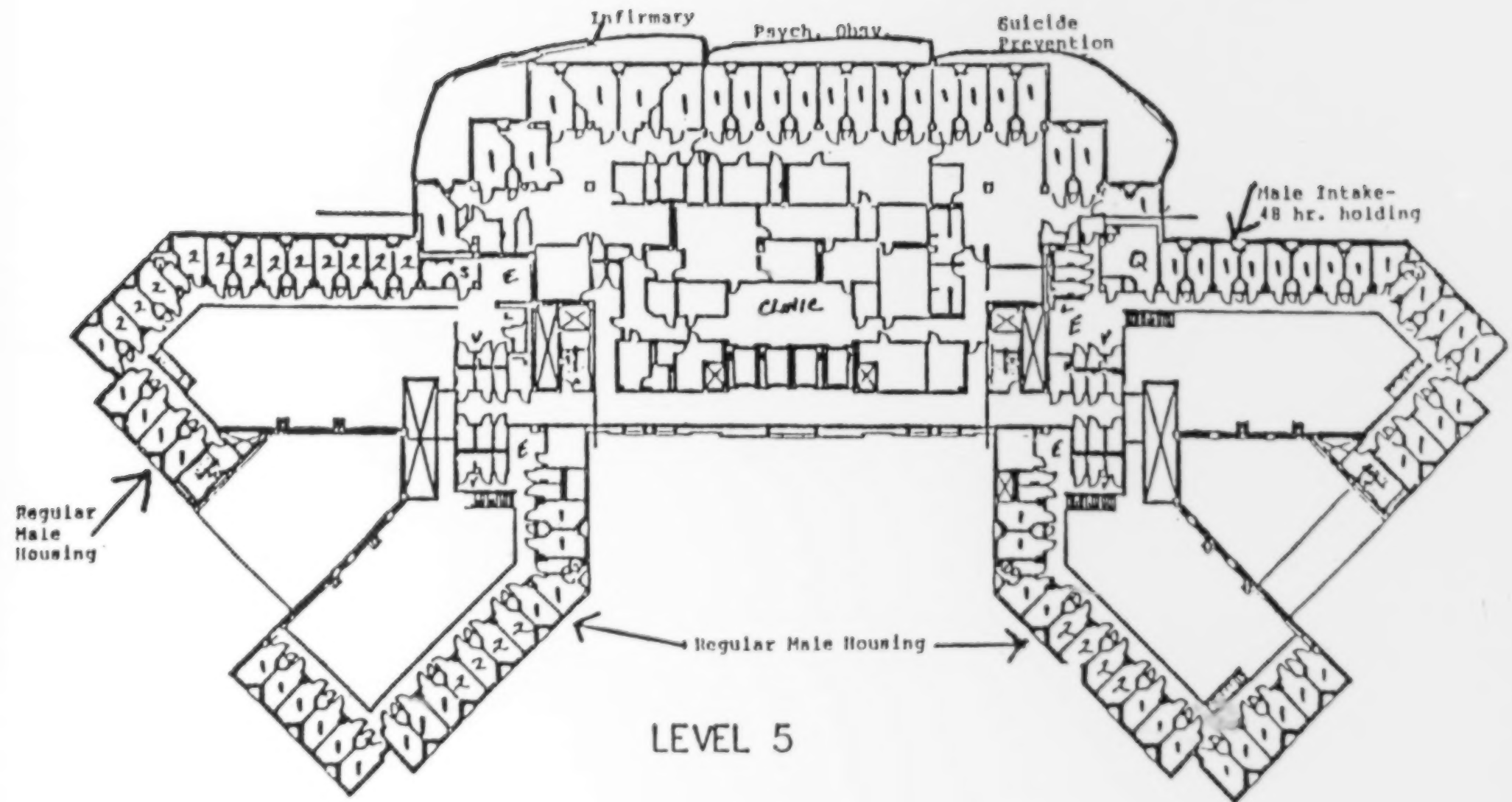


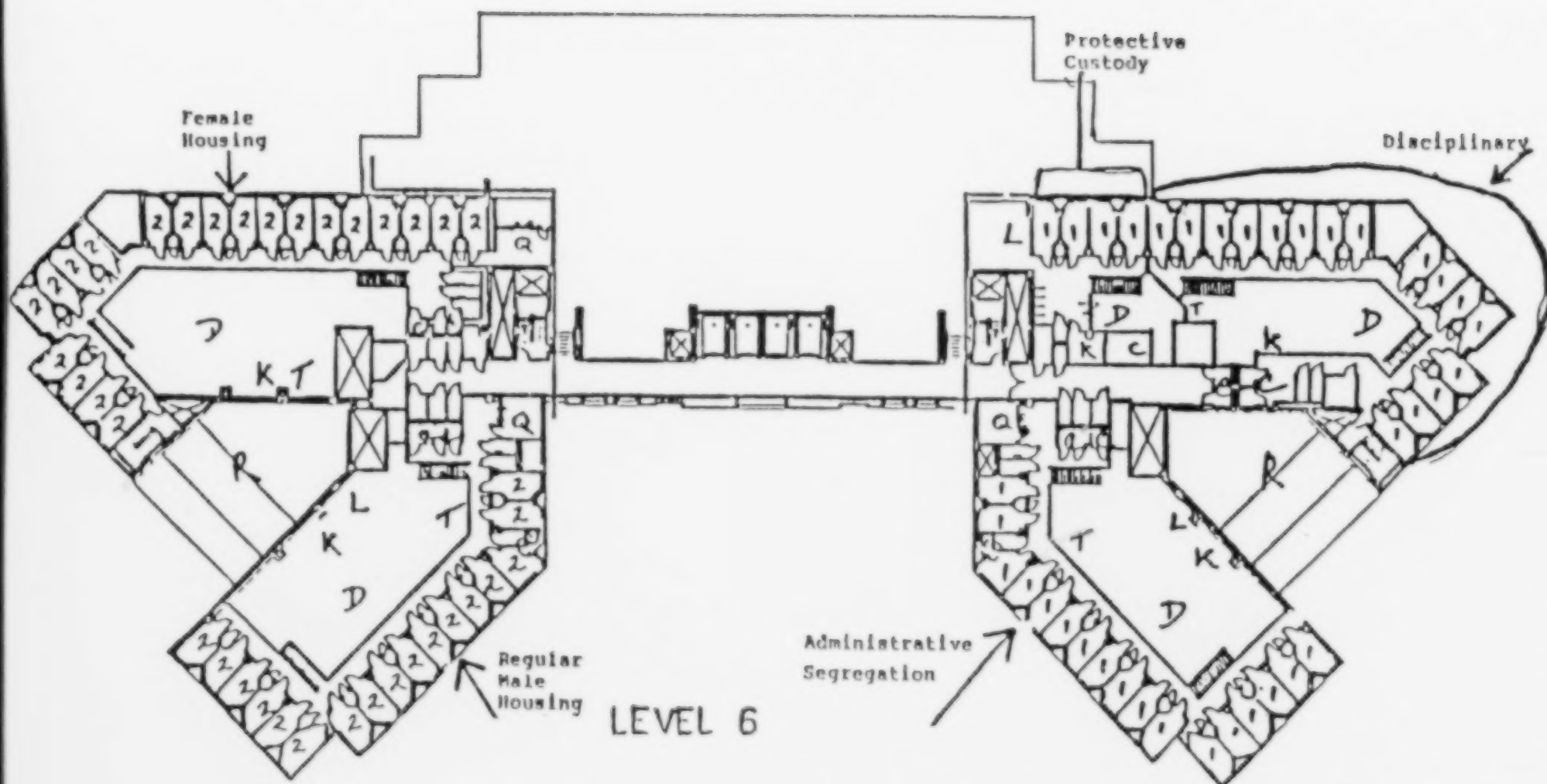
LEVEL 3 - Regular Male Housing

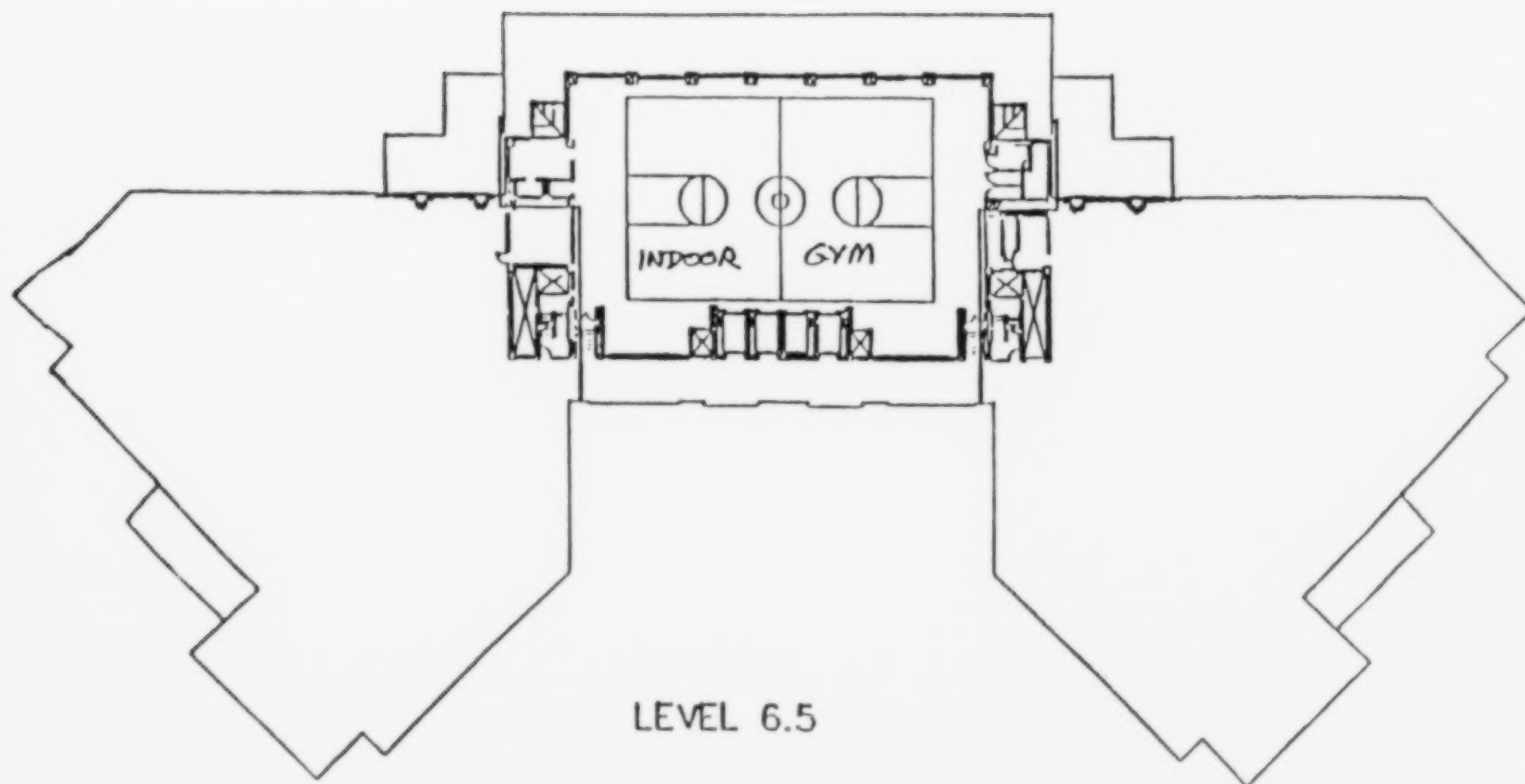
L = GENERAL LIBRARY
LL = LAW LIBRARY
CL = CLASSROOM
ST = STUDY











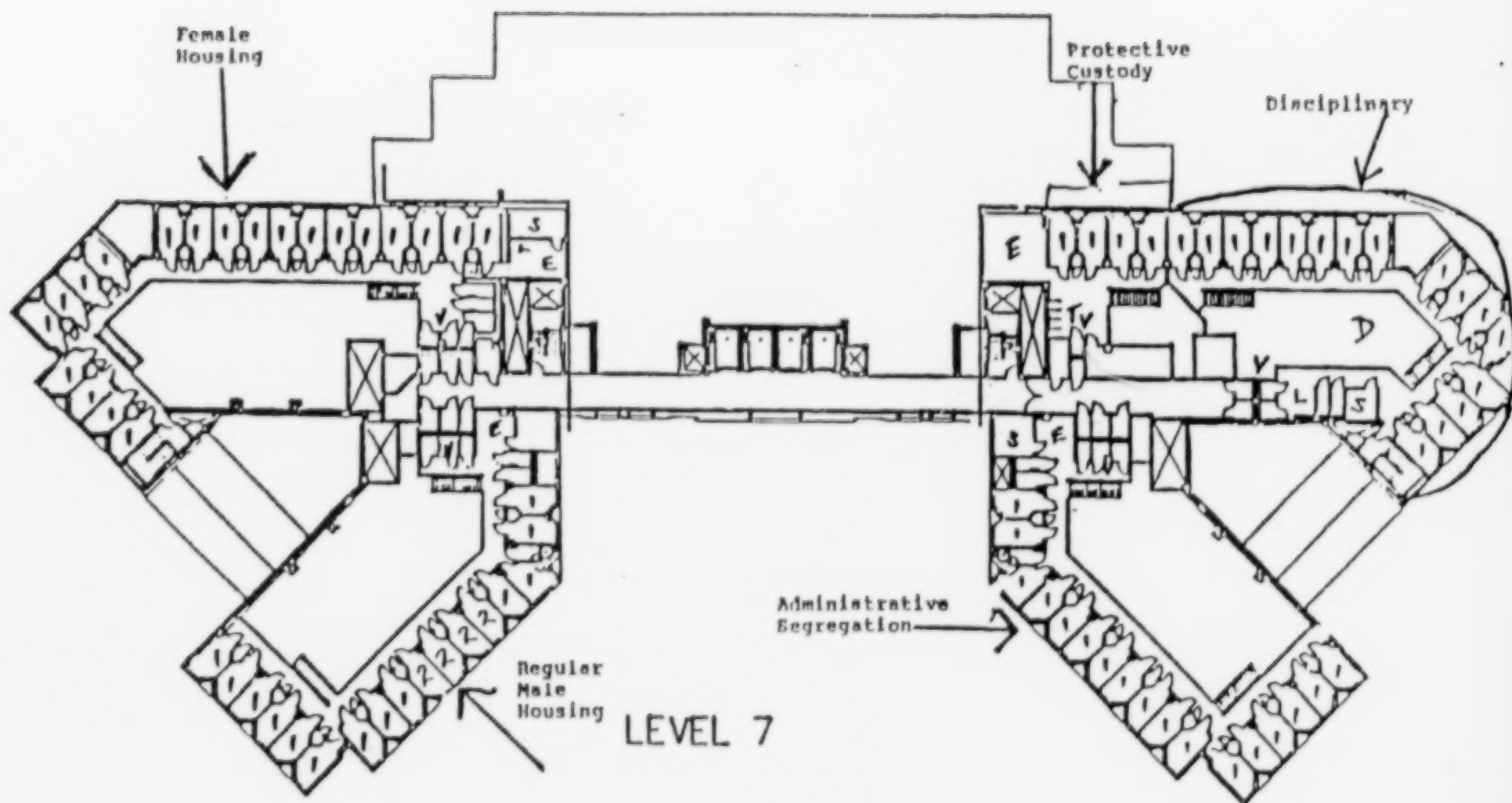
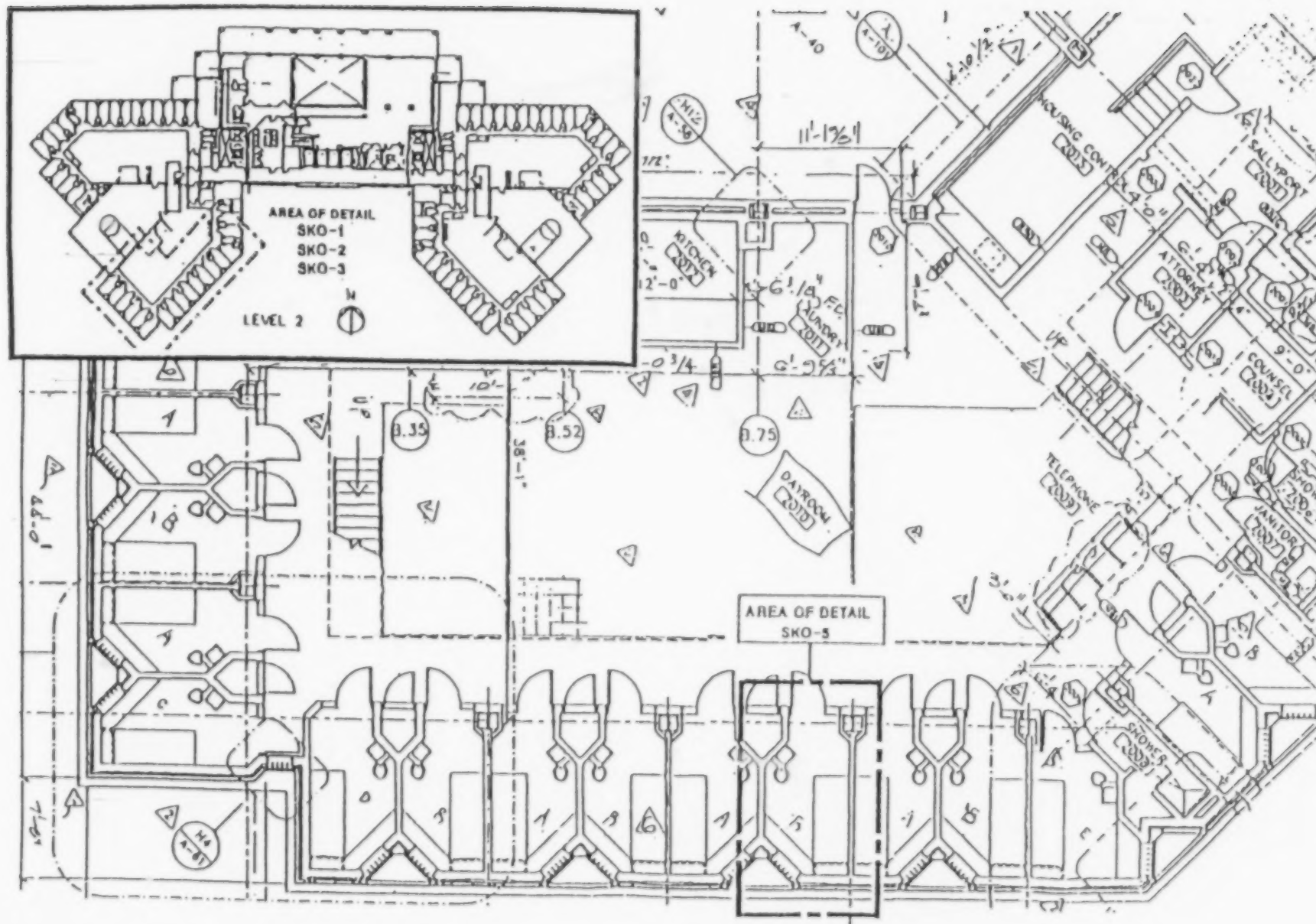


Table I.
Department of Correction Inmate Count and Facility Capacity
by Month for Years 1979-1989

Month	1979		1980		1981		1982		1983		1984		1985		1986		1987		1988		1989	
	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap	Pop	Cap
Jan	2792	2857	2867	2819	3250	2641	3769	2921	4460	3101	4626	3112	5038	3135	5376	3257	5721	3295	6228	3897	6731	3785
Feb	2839	2857	2927	2819	3275	2641	3852	2921	4538	3101	4683	3112	5129	3135	5399	3257	5773	3295	6385	3897	6859	3824
March	2845	2846	2809	2902	3323	2641	3940	3002	4606	3101	4773	3112	5169	3135	5477	3257	5860	3295	6528	3897	6951	3874
April	2862	2846	3020	2811	3322	2641	4030	3002	4649	3101	4817	3112	5118	3257	5529	3257	5945	3295	6611	3972	7086	3874
May	2849	2846	3060	2810	3369	2641	4092	3002	4605	3121	4892	3115	5257	3257	5605	3295	6039	3633	6628	3869	7119	3868
June	2836	2846	3084	2818	3400	2699	4149	3002	4615	3121	4890	3135	5209	3257	5615	3295	5995	3633	6611	3972	7185	3918
July	2809	2846	3053	2819	3436	2698	4216	3002	4629	3121	4968	3135	5274	3257	5629	3295	6119	3633	6652	3785	7258 [*]	3918
Aug	2778	2846	3064	2988	3476	2848	4251	3002	4615	3121	4964	3135	5268	3257	5631	3295	6040	3591	6651	3785		
Sept	2724	2846	3105	2990	3531	2862	4277	3002	4573	3121	4961	3135	5255	3257	5616	3295	6101	3591	6621	3787		
Oct	2825	2846	3143	2996	3614	2921	4359	3081	4647	3100	5000	3135	5313	3257	5661	3295	6136	3591	6658	3787		
Nov	2860	2865	3196	3845	3685	2921	4392	3081	4661	3100	5031	3135	5416	3257	5735	3295	6223	3684	6692	3785		
Dec	2876	2839	3213	2845	3756	2921	4454	3081	4654	3112	5042	3135	5371	3257	5738	3295	6266	3684	6708	3785		

* for 1989, June 30th count was used

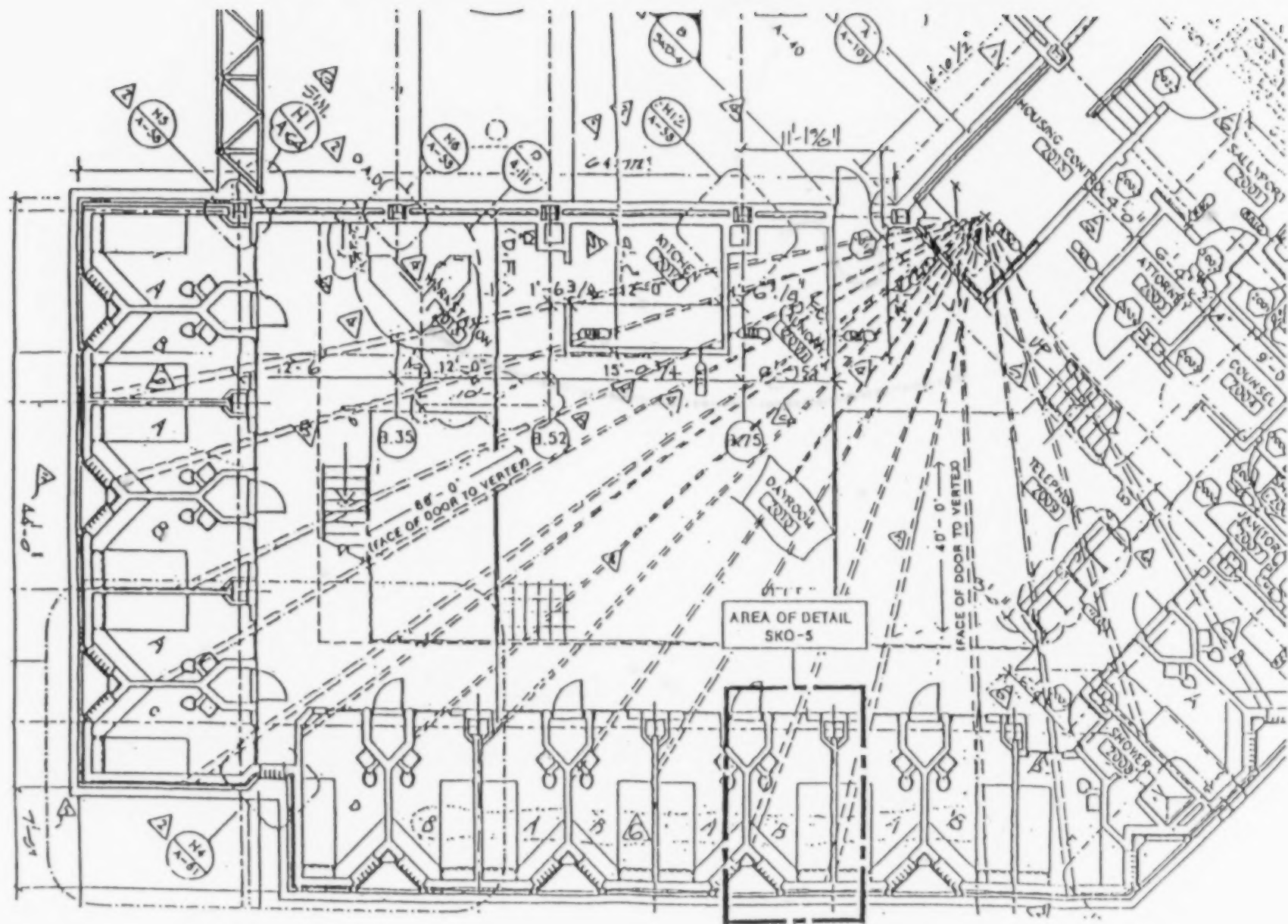
Notes: Bridgewater S.H., S.D.P., and T.C. not included in count
Longwood OUI not included in count



Rollman
 Rollman
 Heineman

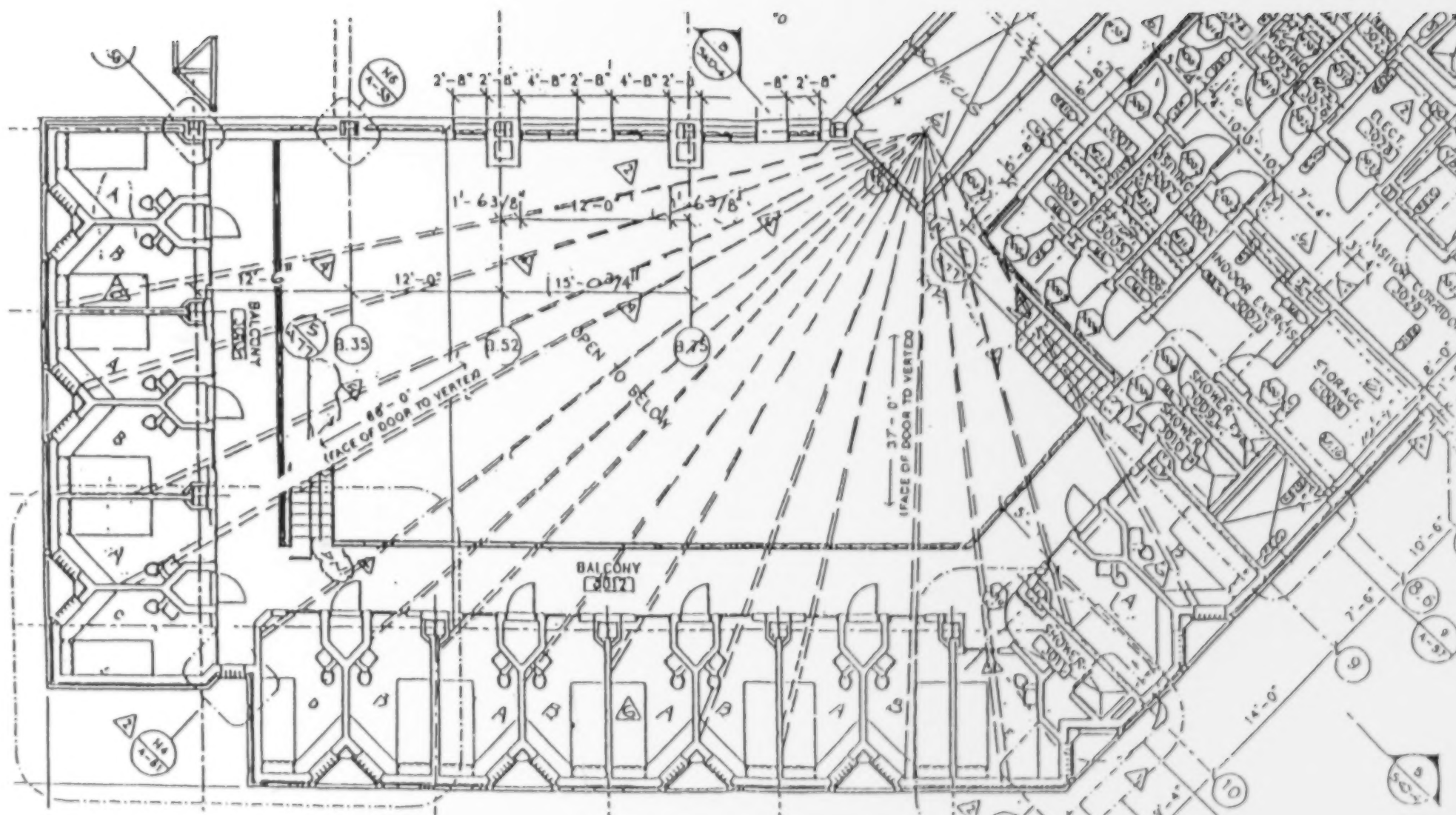
Date 8 SEPT '59 Project SUFFOLK COUNTY JAIL
 Scale 1/8" = 1'-0" Project No. 57312.23
 by R.R. Job PARTIAL NW MODULE AT DAYROOM 2010, LOCATION OF RESIDENT'S ROOM DETAIL

SKO-1



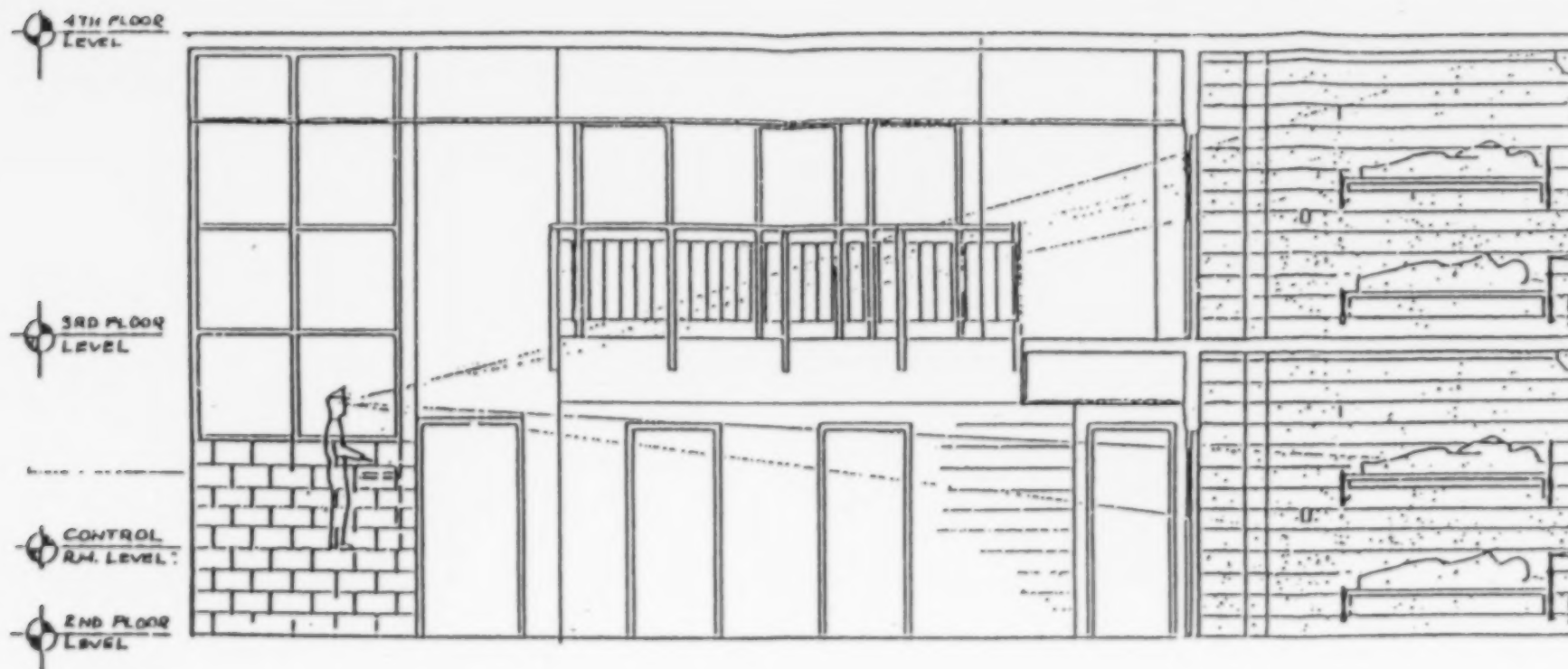
Rothman	Date: 6 SEPT '89	Project: DURAK COUNTY JAIL
Rothman	Scale: 1/8" = 1'-0"	Project No: 57773-03
Heinoman	By: R.R.	Title: RESIDENT VISIBILITY FROM HOUSING CONTROL (LEVEL 2)

SKO-2



<u>Rolymen</u>	Date: 6 SEPT '89	Project: SUFFOLK COUNTY JAIL
<u>Rolymen</u>	Scale: 1/8" = 1'-0"	Project No: 85013.03
<u>Hoheman</u>	By: RQ	Desc: RESIDENT VISIBILITY FROM HOUSING CONTROL (LEVEL 3)

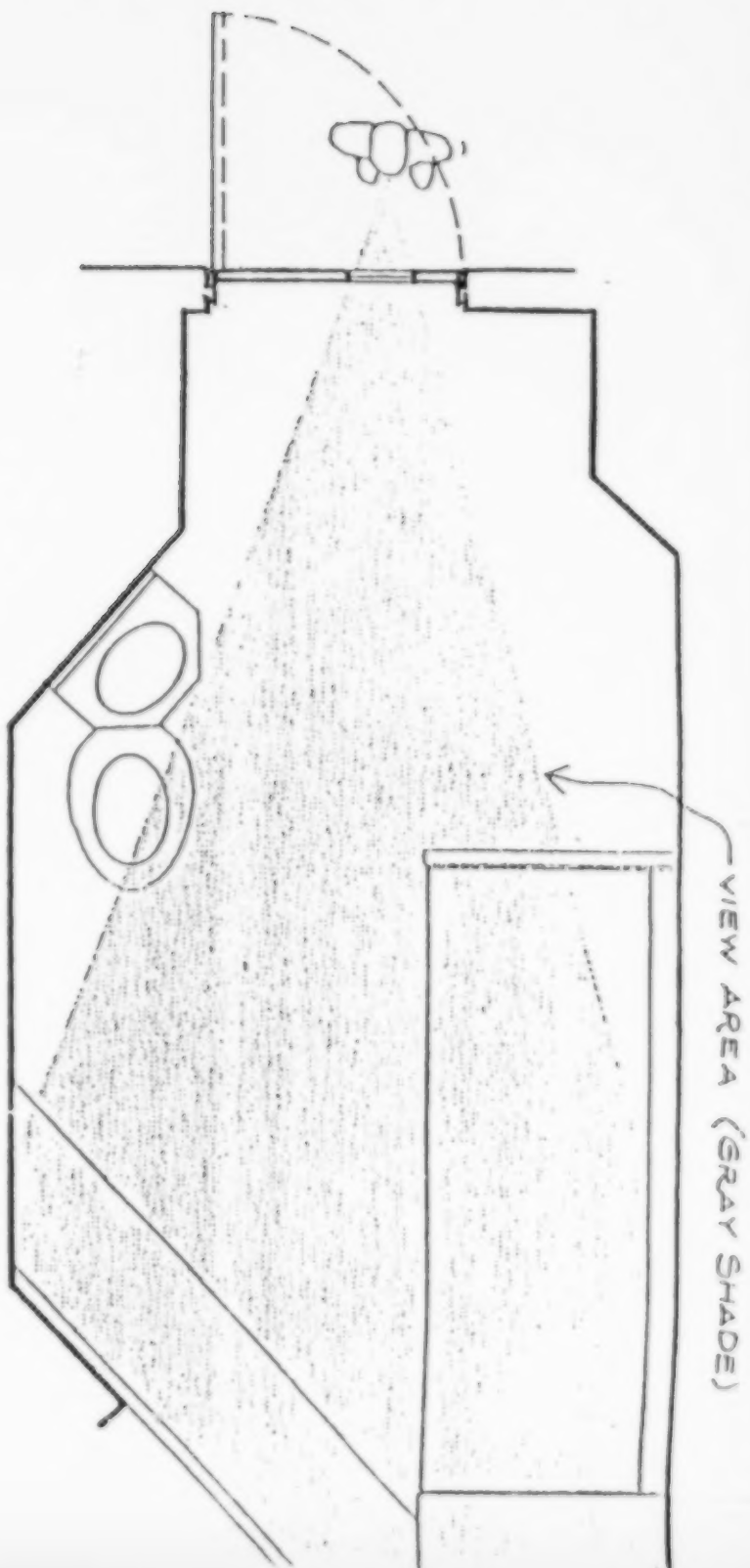
SICO-3



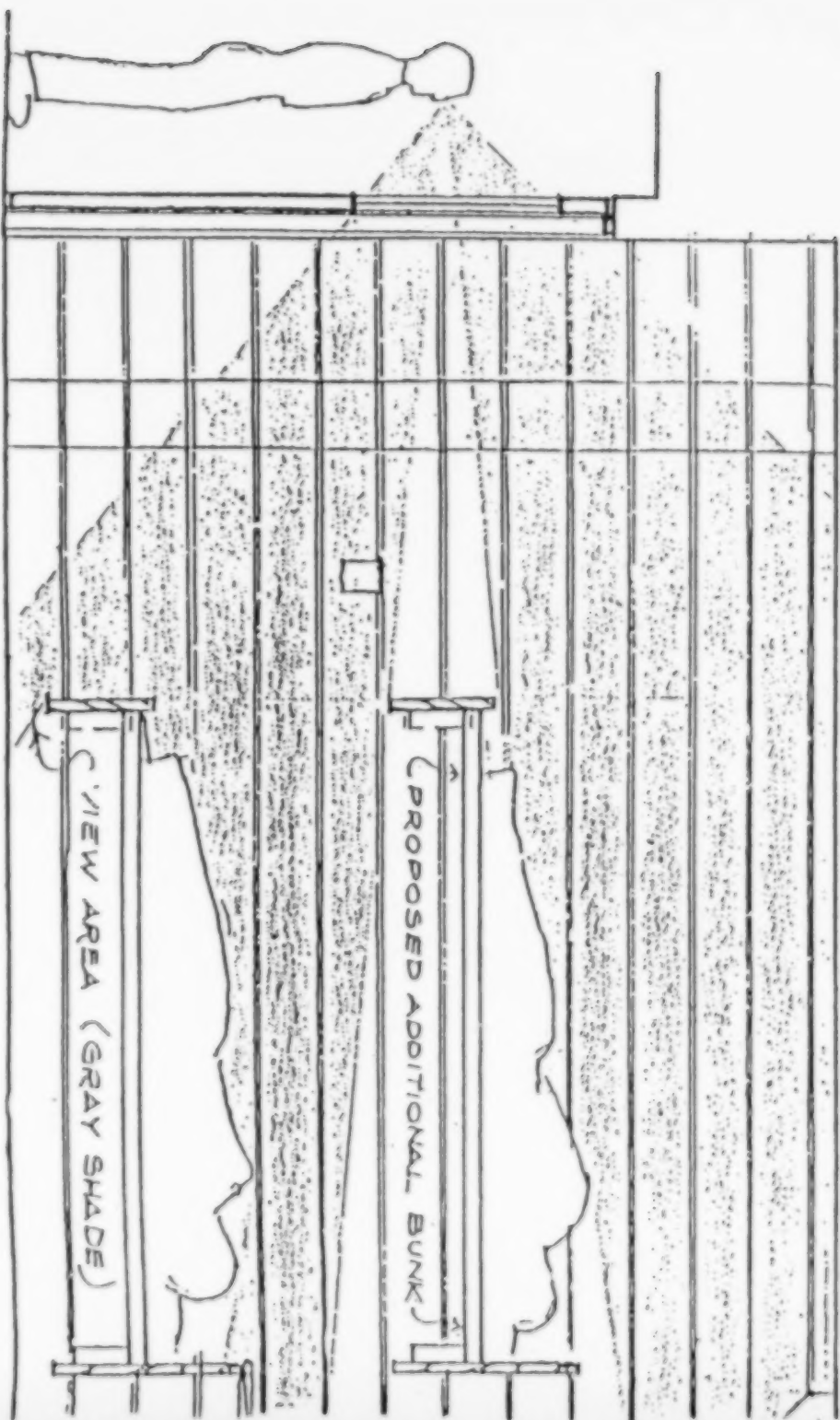
SECTION 'B'

Rothman	Date: 6 SEPT '09	Project: SUFFOLK COUNTY JAIL
Rothman	Scale: 1/4" = 1'-0"	Project No: 63013.03
Hickman	By: RQ	For: RESIDENT VISIBILITY FROM HOUSING CONTROL (SECTION THROUGH CELLS / SECTION 'B')

SKO-4



CELL PLAN (TYPE 'B')



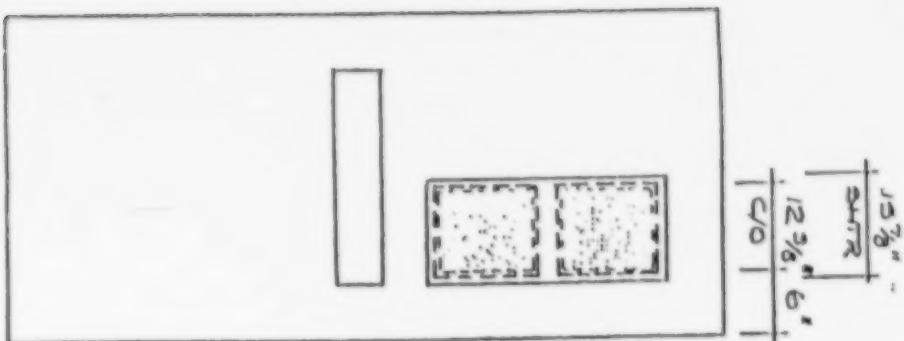
SECTION "A"

Rothman
Heineman

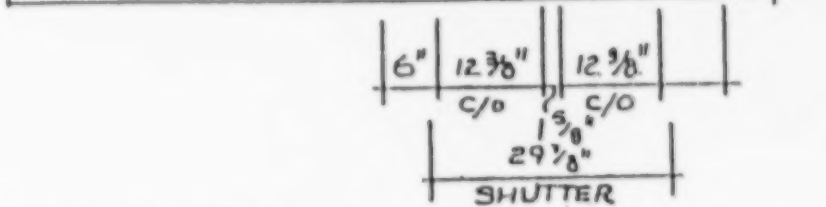
Date: 6/5/87
Scale: 1/2" = 1'-0"
By: RJA

Project: SUFFOLK COUNTY JAIL
Project No: B2013.03
Title: RESIDENT VISIBILITY
TYPICAL TYPE 'B'
RESIDENTS' ROOM

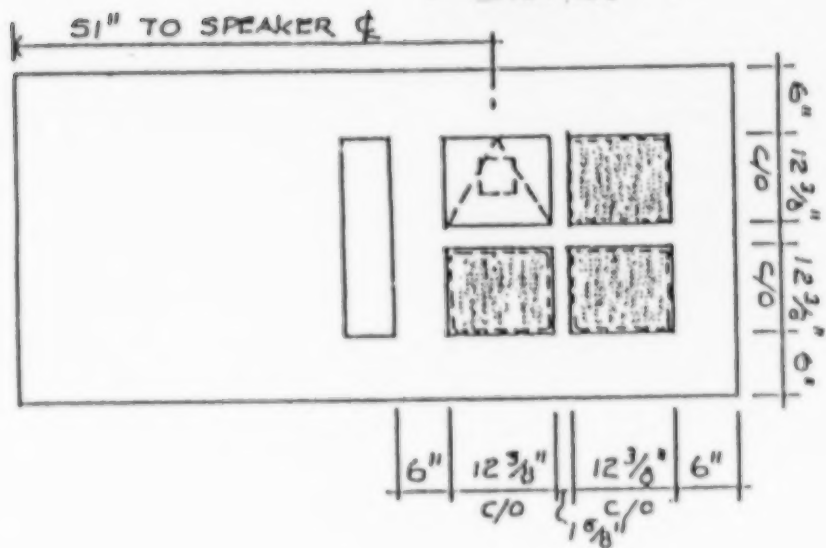
SKO-f



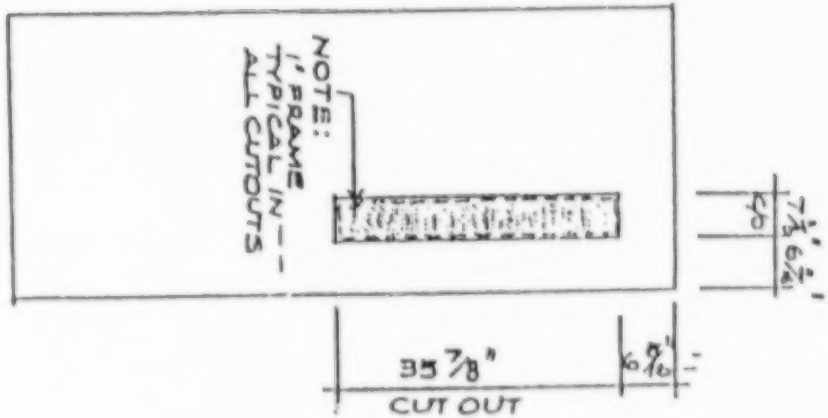
MEDICAL



PSYCHIATRIC



TYPICAL



NOTE:
1" FRAME
TYPICAL IN --
ALL CUTOUTS

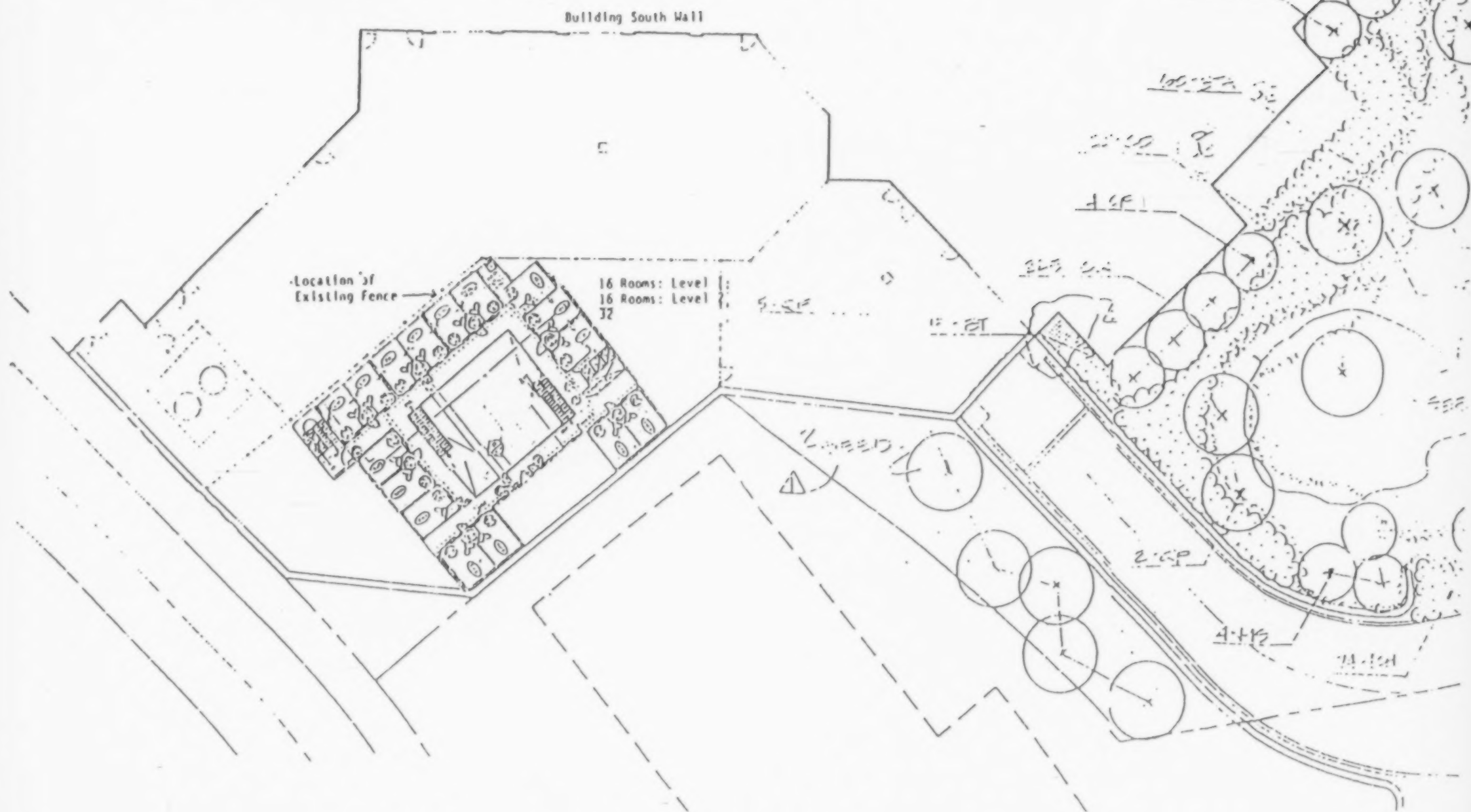
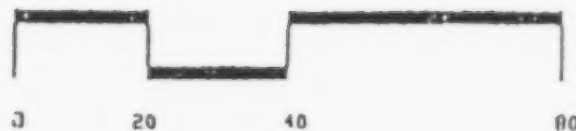
: DENOTES GLASS AREA

Rothman
Rothman
Heinemann

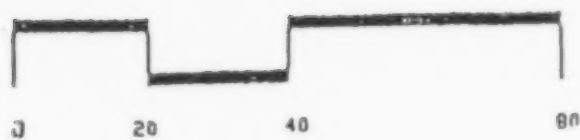
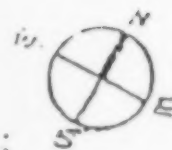
Date: 6 SEPT '09 Project: SUFFOLK COUNTY JAIL
Scale: 1/2" = 1'-0" Project No: 35013.03
By: RQ Title: TYPICAL RESIDENTS' RM.
DOOR TYPES

SKO-6

SUFFOLK COUNTY JAIL B



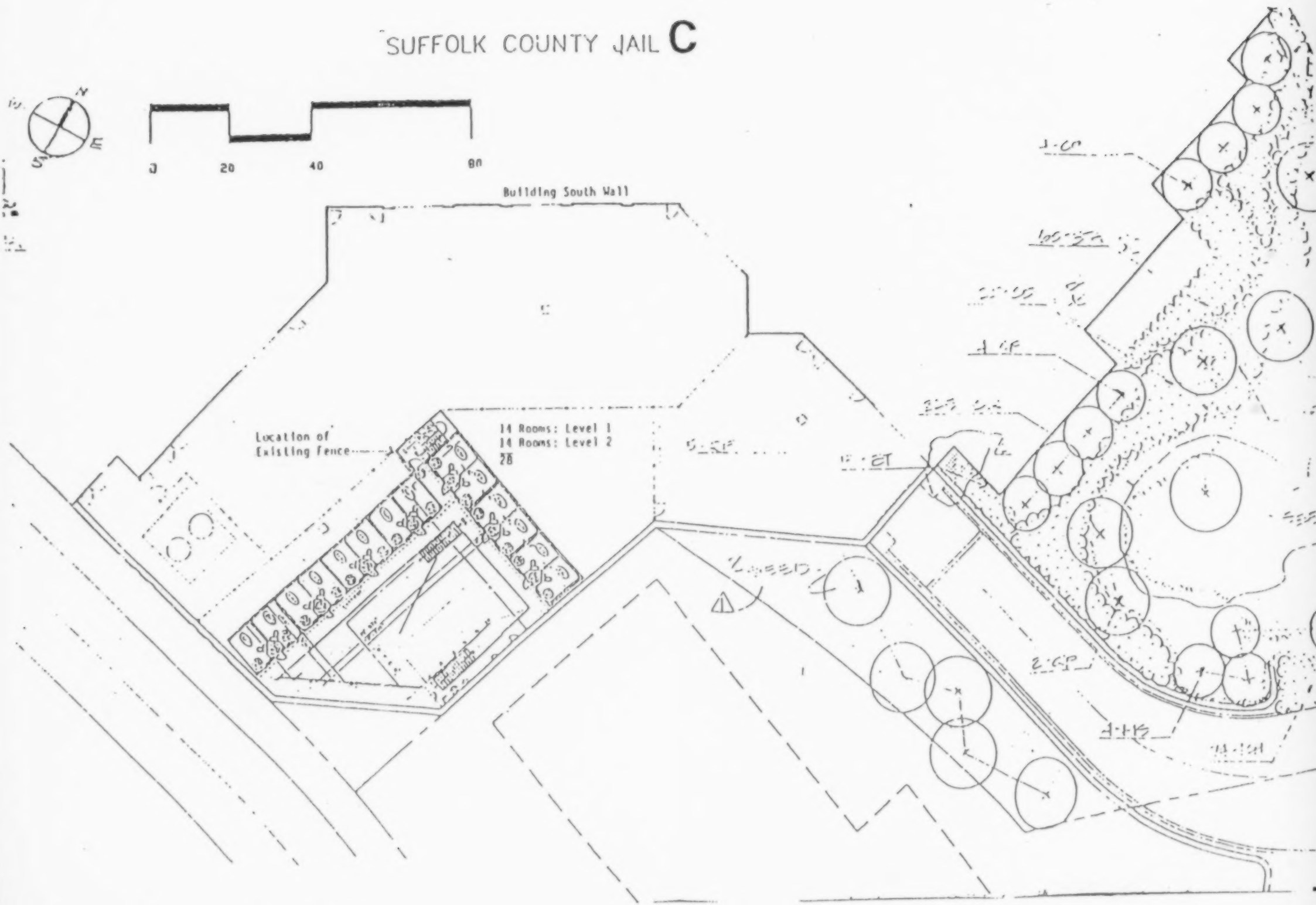
SUFFOLK COUNTY JAIL C



Building South Wall

Location of
Existing fence

14 Rooms: Level 1
14 Rooms: Level 2
28



Nos. 90-954, 90-1004

Supreme Court, U.S.
FILED

APR 12 1991

OFFICE OF THE CLERK

**In the
Supreme Court of the United States.**

October Term, 1990

ROBERT C. RUFO, et al . .
Petitioners in No. 90- 954

v.

INMATES OF THE SUFFOLK COUNTY JAIL ,
Respondents.

THOMAS C. RAPONE ,
Petitioner in No. 90-1004

v.

INMATES OF THE SUFFOLK COUNTY JAIL ,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the First Circuit

BRIEF OF PETITIONER THOMAS C. RAPONE

Scott Harshbarger
Attorney General
of Massachusetts

Jon Laramore
Thomas A. Barnico
* Douglas H. Wilkins
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

QUESTIONS PRESENTED

1. When the unconstitutional conditions giving rise to a consent decree have been eliminated, may the district court refuse to modify provisions of the consent decree that exceed constitutional requirements and interfere with local officials' administration of their legal duties.

2. Should a district court addressing modification of a consent decree governing a public institution, such as a jail, apply the flexible standard for public law litigation that has been adopted by most circuits, which emphasizes the effect of changed circumstances on the public interest, or must it apply the stricter standard used by the court appeals?

PARTIES TO THE PROCEEDING

The petitioners are the Mayor of Boston, Massachusetts; Robert C. Rufo, Sheriff of Suffolk County, Massachusetts (No. 90-954); and Thomas C. Rapone, Massachusetts' Commissioner of Correction (No. 90-1004).^{1/} The respondents are the inmates of the Suffolk County Jail, a class of persons defined in the district court's order dated June 24, 1971.

In addition, the following parties are inactive respondents: City Council of Boston; Massachusetts' Deputy Commissioner of Capital Planning and Operations; and Massachusetts' Secretary of Administration and Finance.

^{1/} Pursuant to Rule 35.3, Thomas C. Rapone, now Commissioner of Correction, is substituted as petitioner for George A. Vose.

TABLE OF CONTENTS

DECISIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	26
ARGUMENT	30
I. THE DISTRICT COURT COMMITTED AN ERROR OF LAW IN DECLINING TO MODIFY THE CONSENT DECREE BECAUSE THE NEW JAIL HAS NO CONSTITUTIONAL VIOLATIONS.	30
A. The District Court Was Required To Modify the Consent Decree Because The New Jail Contains No Constitutional Violation.	30
B. The District Court Violated Principles of Federalism by Failing to Modify the Decree	37
C. The Terms of the 1979 Consent Decree Neither Enlarge the District Court's Powers Nor Support Perpetual Single-Celling.	41
D. The District Court Erred By Failing to Modify the Consent Decree Based on a Change in Law.	50

II. THE DISTRICT COURT COMMITTED AN ERROR OF LAW BY REFUSING TO MODIFY THE CONSENT DECREE BECAUSE OF THE DRASTIC INCREASE IN INMATE POPULATION.	55
A. The District Court Was Required To Modify The Consent Decree Based On Changed Circumstances, The Public Interest, The Terms Of The Consent Decree, And Substantive Law.	55
B. The Public Law Modification Standard Properly Allows Public Officials to Fulfill Their Duties.	63
C. Under The Public Law Standard, Changes Of Circumstances In This Case Require This Court To Remand With Direction To Modify.	71
CONCLUSION	76

Table of Authorities

Cases

<u>Alliance to End Repression</u> <u>v. Chicago</u> , 742 F.2d 1007 (7th Cir. 1984) (en banc)	44
<u>Bell v. Wolfish</u> , 441 U.S. 520 (1979)	28, 32, 33, 36, 51, 54
<u>Block v. Rutherford</u> , 468 U.S. 576 (1984)	39
<u>Board of Education of</u> <u>Oklahoma City v. Dowell</u> , 111 S.Ct. 630 (1991)	35
<u>Boston Chapter, NAACP v.</u> <u>Beecher</u> , 679 F.2d 965 (1st Cir. 1982), <u>vacated</u> 461 U.S. 477, <u>vacated as moot</u> , 716 F.2d 931 (1st Cir. 1983), <u>vacated</u> 468 U.S. 1206, <u>vacated as moot</u> , 749 F.2d 102 (1st Cir. 1984)	5
<u>Citizens for a Better</u> <u>Environment v. Gorsuch</u> , 718 F.2d 1117 (D.C. Cir. 1983), <u>cert. denied</u> 467 U.S. 1219 (1984)	45
<u>Coalition of Black</u> <u>Leadership v. Cianci</u> , 570 F.2d 12 (1st Cir. 1978)	52
<u>Duran v. Elrod</u> , 760 F.2d 756 (7th Cir. 1985)	49, 58, 62, 70

<u>Firefighters v. Stotts,</u> 467 U.S. 561 (1984)	48
<u>Handschu v. Special Services Div.,</u> 787 F.2d 828 (2d Cir. 1986)	44
<u>Heath v. DeCourcy,</u> 888 F.2d 1105 (6th Cir. 1989)	58
<u>Inmates of Suffolk County Jail v. Eisenstadt,</u> 494 F.2d 1196, 1199 (1st. Cir.) <u>cert. denied</u> 419 U.S. 977 (1974)	9
<u>Kasper v. Board of Election Comms. of Chicago,</u> 814 F.2d 332 (7th Cir. 1987)	38
<u>Keith v. Volpe,</u> 784 F.2d 1457 (9th Cir. 1986)	58, 59
<u>Langton v. Johnston,</u> No. 89-2052 (1st Cir. March 22, 1991)	5
<u>Lelsz v. Kavanagh,</u> 807 F.2d 1243, <u>reh. denied</u> 815 F.2d 1034 (5th Cir.) <u>cert. dismissed</u> 483 U.S. 1057 (1987)	38, 44
<u>Local No. 93 v. Cleveland,</u> 478 U.S. 501 (1986)	41, 43, 44
<u>Martin v. Wilks,</u> 490 U.S. 755 (1989)	61

Massachusetts Assn. of Older
Americans v. Commissioner of
Public Welfare,
803 F.2d 35 (1st Cir. 1986) 5

Massachusetts Assn.
for Retarded Citizens
v. King,
643 F.2d 899 (1st Cir. 1981) 5

Milliken v. Bradley,
418 U.S. 717 (1974) 35, 70

Nelson v. Collins,
659 F.2d 420
(4th Cir. 1981)
(en banc) 36, 54, 58

Newman v. Graddick,
740 F.2d 1513
(11th Cir. 1984) 36, 54, 58, 64

New York State Association
for Retarded Citizens v. Carey,
706 F.2d 956 (2d Cir.)
cert. denied
464 U.S. 915 (1983) 57, 58, 60, 70

O'Shea v. Littleton,
414 U.S. 488 (1974) 38

Pasadena City Board of
Education v. Spangler,
427 U.S. 424 (1976) 35, 53

Philadelphia Welfare Rights
Org. v. Shapp,
602 F.2d 1114 (3d Cir. 1979)
cert. denied
444 U.S. 1026 (1980) 57, 58, 68

Plyler v. Evatt,
 846 F.2d 208 (4th Cir.)
cert. denied
 488 U.S. 897 (1988) 49, 58, 62, 70

Procunier v. Martinez,
 416 U.S. 396 (1974) 40

Rhodes v. Chapman,
 452 U.S. 337 (1981) 28, 32, 33, 36,
 51, 54, 67

Rizzo v. Goode,
 423 U.S. 362 (1976) 38

Sansom v. Lynn,
 735 F.2d 1535,
 (3d Cir.) cert. denied
 469 U.S. 1017 (1984) 39

System Federation No. 91
v. Wright,
 364 U.S. 642 (1961) 34, 46, 51, 63

Swann v. Charlotte-Mecklenburg
Board of Education,
 402 U.S. 1 (1971) 34, 53

Turner v. Safley,
 482 U.S. 78 (1987) 39

United States v. Commonwealth
of Massachusetts,
 890 F.2d 507 (1st Cir. 1989) 5

United States v. ITT
Continental Baking Co.,
 420 U.S. 223 (1975) 48

United States v. Swift & Co.,
 286 U.S. 106 (1932) 23, 35, 64
 65, 66, 67

United States v.
W.T. Grant Co.,
345 U.S. 629 (1953) 34

United States Trust Co.
v. New Jersey,
431 U.S. 1 (1977) 42

Washington v. Penwell,
700 F.2d 570 (9th Cir. 1983) 45

Younger v. Harris,
401 U.S. 37 (1971) 37

Constitution and Statutes

Constitution, Art. III, § 2	37
28 U.S.C. § 1254(1)	1
Mass. Gen. Laws c. 34, § 3 (1988 Official Ed.)	12
Mass. Gen. Laws c. 34, § 4 (1988 Official Ed.)	12
Mass. Gen. Laws c. 124, § 1(d) (1988 Official Ed.)	21
1985 Mass. Acts 799	12, 13

Publications

Anderson, <u>Implementation of Consent Decrees in Structural Reform Litigation</u> , 1986 U. Ill. L. Rev. 725	68
Coffin, <u>The Frontier of Remedies: A Call for Exploration</u> , 67 Calif. L. Rev. 983 (1979)	69
Chayes, <u>The Role of the Judge in Public Law Litigation</u> , 89 Harv. L. Rev. 1281 (1976)	57, 69
Diver, <u>The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions</u> , 65 Va. L. Rev. 43 (1979)	69, 70

Easterbrook, <u>Justice and Contract in Consent Judgments</u> , 1987 U. Chi. Legal F. 19	45, 67
Fiss, <u>The Forms of Justice</u> , 93 Harv. L. Rev. 1 (1979)	61
Fletcher, <u>The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy</u> , 91 Yale L.J. 635 (1982)	69
Fuller, <u>The Forms and Limits of Adjudication</u> , 92 Harv. L. Rev. 353 (1978)	70
Horowitz, <u>Decreeing Organizational Change: Judicial Supervision of Public Institutions</u> , 1983 Duke L.J. 1265	67
Jost, <u>From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts</u> , 64 Tex. L. Rev. 1101 (1986)	60, 62
Laycock, <u>Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties</u> , 1987 U. Chi. Legal F. 103	62

McConnell, Why Hold Elections?
Using Consent Decrees to Insulate
Policies from Political Change,
1987 U. Chi. Legal F. 295 45, 67, 68

Note, Federalism and Federal Consent
Decrees Against State Governmental
Entities,
88 Col. L. Rev. 1796 (1988) 37, 42

Note, Implementation Problems
in Institutional Reform Litigation,
93 Harv. L. Rev. 428 (1977) - 60

Note, The Modification of Consent
Decrees in Institutional Reform
Litigation,--
99 Harv.L. Rev. 1020 (1986) 51, 61

Rabkin & Devins, Averting Government
by Consent Decree: Constitutional
Limits on the Enforcement of
Settlements with the Federal
Government,
40 Stan. L. Rev. 203 (1987) 42, 67

Shane, Federal Policy Making
By Consent Decree, 1987 U. Chi.
Legal F. 241 42

Miscellaneous

Memorandum of Attorney General
Edwin Meese III, Department
Policy Regarding Consent Decrees
and Settlement Agreements,
reprinted in Dep't of Justice Manual
§ 4-2.100A (1987 ed.)
reprinted in part at
54 U. S. L. Week 2492 (1986) 67

DECISIONS BELOW

The opinion of the court of appeals is noted at 915 F.2d 1557 (1st Cir. 1990) (unpublished opinion) and appears in full at Pet. 2a-4a.^{2/}

The memorandum and order of the district court appears at 734 F. Supp. 561 (D.Mass. 1990) and at Pet. 5a-14a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

^{2/} In this brief, references to the Joint Appendix are designated "A."; references to the Appendix in the United States Court of Appeals are designated "R."; and references to the Appendix to the Petition for Certiorari in 90-954 are designated "Pet."

STATEMENT OF THE CASE

Introduction

This action began in 1971 as a challenge to conditions of confinement at the former Suffolk County Jail, known as the Charles Street Jail, a facility built in 1848, which contained large tiers of barred cells, had defective plumbing and heating, and provided inmates with little privacy or sanitation. See Pet. 25a-34a (district court findings dated June 20, 1973). The old Charles Street Jail did not meet constitutional standards. Pet. 40a. The district court entered orders and a consent decree to rectify the unconstitutional conditions. See, e.g., Pet. 15a-21a, 49a-54a.

Now, however, the Massachusetts Commissioner of Correction and Sheriff

of Suffolk County seek relief from the consent decree, which the district court has applied to the operation of the new Suffolk County Jail, known as the Nashua Street Jail. The new jail was opened in 1990 and is "the most modern correctional facility in the Commonwealth" of Massachusetts. A.

140. The Nashua Street Jail's rooms are arranged in modular groups of no more than 40, with each group built around a large common area. A. 136. Each room has a window to the outside and a door with a window, rather than bars.

A. 78. Each climate controlled module contains a day room, a kitchenette, a "quiet room," two counseling rooms, showers, telephones, two televisions, an exercise area, a noncontact visiting room, and a washer and dryer for

personal laundry. A. 78-83, 136. Each modular unit is connected to an outdoor exercise area, and all inmates have access to two libraries and classrooms. A. 136, 201.

The Commissioner and Sheriff seek to modify the requirement of a 1979 consent decree, as modified in 1985, that inmates in the Suffolk County Jail be housed one-per-cell. Requiring one inmate per cell in the Nashua Street Jail, an entirely new facility, exceeds constitutional requirements and unduly interferes with the duty of the Sheriff to operate the jail in the public interest.^{3/}

^{3/} The Commissioner's direct interest in the consent decree stems from the requirement that he accept certain inmates transferred to him when the Sheriff is not able to house in the new
(footnote continued)

Prior Proceedings

Certain inmates of the Charles Street Jail filed the complaint in this

(footnote continued)

jail all of those committed to his custody. The Commissioner's interest in this litigation is broader, however, because more than half the county jails in Massachusetts are operated under consent decrees or judicial orders, see R. 427, 430, 548, 465, 470, thus impeding his capacity to perform his statutory duty to set standards for county jail conditions. Moreover, the Commonwealth of Massachusetts has a great and direct interest in this litigation because it is the subject of comprehensive consent decrees regarding corrections, Langton v. Johnston, No. 89-2052 (1st Cir. March 22, 1991); mental health, United States v. Commonwealth of Massachusetts, 890 F.2d 507 (1st Cir. 1989); mental retardation, Massachusetts Assn. for Retarded Citizens v. King, 643 F.2d 899 (1st Cir. 1981); public assistance programs, Massachusetts Assn. of Older Americans v. Commissioner of Public Welfare, 803 F.2d 35 (1st Cir. 1986); and affirmative action, Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), vacated 461 U.S. 477, vacated as moot, 716 F.2d 931 (1st Cir. 1983), vacated 468 U.S. 1206, vacated as moot, 749 F.2d 102 (1st Cir. 1984). These consent

case in 1971. In 1971, the district court (Garrity, J.) certified a class of "inmates of the Suffolk County Jail," and the plaintiffs have been identified in the pleadings solely by that designation since then. The primary defendant in 1971 was Sheriff Thomas S. Eisenstadt, who was succeeded in 1977 by Dennis J. Kearney, who was succeeded in 1987 by Robert C. Rufo.

In 1973, the district court held that conditions under which persons awaiting trial were detained in the old jail were unconstitutional. Pet. 38a-44a, 48a-50a. District Judge Garrity found several specific

(footnote continued)

decrees substantially restrict State officials' freedom to operate programs and make budgetary decisions.

constitutional violations and concluded that holding more than one inmate per cell in the old jail violated constitutional standards. Pet.

42a-43a. The district court ordered that no more than one inmate be held in each cell of the old jail. Pet. 47a.

The district court also held that the unconstitutional conditions could not be remedied without construction of a new jail. Pet. 40a. The district court in 1973 therefore enjoined the Sheriff of Suffolk County from holding any pretrial detainees in the Charles Street Jail after June 30, 1976. Pet. 48a. The district court and court of appeals extended this deadline several times. A. 32, 44-48.

In the face of a firm closing deadline, the Mayor and City Council of

Boston filed a plan with the district court in September, 1978, for construction of a renovated and expanded Charles Street Jail, after which the district court allowed the old jail to remain open pending completion of the planned construction. A. 59-60.

Consent Decree

On April 9, 1979, the parties, including the Sheriff, inmates, Mayor of Boston, City Council of Boston, and Massachusetts Commissioner of Correction, signed a seven-page consent decree that obligated the defendants to construct a jail in accordance with the September, 1978, plan.^{4/} Pet. 15a-22a;

^{4/} The Commissioner of Correction sought to be dismissed as a party early
(footnote continued)

A. 61-87, 249-259; R. 174-290. The jail described by the consent decree was to be on the site of the old jail and was to include both new construction and substantial renovation of the old jail.

A. 68-70.

The consent decree stated that its purposes were to "provide, maintain and operate . . . a suitable and constitutional jail for Suffolk County pretrial detainees"; to allow the Sheriff to continue to house pretrial

(footnote continued)

in the case. His motion was denied based only on his state law duties to regulate county jails, not on any finding that he had a constitutional duty to inmates. Inmates of Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199 (1st. Cir.) cert. denied 419 U.S. 977 (1974).

inmates in the Charles Street Jail pending completion of the new jail; to limit inmates' exposure to unconstitutional conditions of confinement; and to "avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" of the new jail. Pet. 15a-16a.

The consent decree further stated that the new jail "shall be designed and built according to the standards and specifications contained in" a 110-page architectural program "attached hereto and incorporated in this decree . . .," although the district court could permit departure from the program. Pet. 16a. The 1979 consent decree contained no requirement that only one inmate be held in each cell, but the architectural

program assumed single-occupancy cells.

A. 73.

The jail described in the architectural program contained space to house 309 inmates. This population limit was based on projections incorporated in the consent decree which indicated that a capacity of 309 would be adequate for more than 20 years. A. 69. The architectural program projected that the number of inmates committed to the Sheriff's custody would fall from 245 in 1979 to 215 by 1995. Id.

State Court Proceedings

The new jail on Nashua Street was built as a result of state court litigation filed because work on the new jail had not commenced by 1984, five years after the consent decree was signed. In October, 1984, the Sheriff

refused to accept custody of certain pretrial detainees because he could not house additional inmates without violating the 1973 order of the district court limiting occupancy of the Charles Street Jail to one inmate per cell. As a result, the Attorney General of Massachusetts sued the Sheriff in state court seeking an order that the Sheriff accept all the inmates committed to his custody. The Sheriff promptly filed his own action in the same state court against the Mayor and City Council seeking funding for a new jail. R. 302-316.^{5/}

^{5/} The Mayor and City Council, who as Suffolk County Commissioners are responsible for paying for the jail, Mass. Gen. Laws c. 34, §§ 3-4, appealed state court orders that they pay for a new jail. R. 330-334; 350-352. The actual construction costs for the new jail were paid entirely by the Commonwealth of Massachusetts. 1985 Mass. Acts 799.

To resolve the state court case, the parties agreed to the construction of a jail to be located on a new site on Nashua Street. R. 350-352. This plan abandoned the Charles Street Jail site, although that site had been the subject of the architectural program "incorporated" in the 1979 district court consent decree. The Massachusetts Legislature appropriated funds for the Nashua Street project in 1985 Mass. Acts 799.

In February, 1985, the inmates moved in the federal district court to modify the consent decree to allow for construction of the new, larger Suffolk County Jail pursuant to 1985 Mass. Acts 799. A. 88-101. The Sheriff and Commissioner assented to this motion.

The district court (Keeton, J.) found the modification "necessary to meet the unanticipated increase in jail population." He modified the consent decree to allow the capacity of the jail to be increased so long as 1) only one inmate was housed in each cell; 2) the same proportion of cell space to support services is maintained; 3) all modifications were incorporated in an architectural plan; and 4) defendants completed construction of the jail by January, 1990. A. 110-113. The district court's requirement that the sheriff hold only one inmate per cell for the first time applied the assumption of the 1979 architectural program (which described modifications

of the Charles Street Jail) to the new Nashua Street Jail.^{6/}

As constructed (and completed in early 1990), the new Nashua Street Jail contains 453 cells. A. 134. The inmates are permitted to spend three quarters of their waking hours outside their cells in common areas, using exercise facilities, watching television, or using a library. A. 143. The Nashua Street Jail provides conditions "superior to those of any other facility" in the Commonwealth. A. 140.

^{6/} Portions of the district court's order, including the single-celling requirement, were suggested in a draft order provided by the Sheriff. A. 107-108.

Motion for Modification

While the Nashua Street Jail was under construction in 1989, the Sheriff moved in the district court to modify the consent decree to allow him to house two inmates in each of 197 of the 453 cells in the new jail. A. 246-248; R. 73-120. The Sheriff's proposed modification would maintain the amount of total floor space per inmate recommended by the American Correctional Association, and would allow the Nashua Street Jail to meet all other criteria of the Association, save that for cell space per inmate. A. 193-194; R. 992.^{7/} The proposed modification incorporates an inmate classification

^{7/} The consent decree refers explicitly to American Correctional Association standards. A. 64-65.

system, designed to ensure that inmates who may present a safety problem will be housed alone. A. 143; R. 762-768.

The Sheriff moved to modify the consent decree in 1989 because the number of inmates committed to his custody increased unexpectedly. App. 246-247. The inmate population at the time the Sheriff made his motion was almost 200 inmates per day greater than the average population predicted by the parties in the consent decree. See A. 69, 243. It was nearly 100 inmates per day greater than the average population at the time the inmates moved to expand the size of the jail in 1985. See A. 91, 243.

The increase in the number of inmates committed to the Sheriff's custody has occurred because of an

increase in crime in Suffolk County. A. 114-115, 122-123. The District Attorney of Suffolk County described a "dramatic increase in serious crime" resulting in more arrests and prosecutions. A. 114. The Boston Police increased the number of arrests by more than 20% from 1986 to 1989, leading to a corresponding increase in the number of pretrial detainees, according to the Police Commissioner. A. 122. Most inmates committed to the Sheriff's custody are charged with serious felonies, such as violent crimes and sale of drugs. A. 211-212.

As a result of increased crime, the average number of inmates has burgeoned since 1988. A. 243. From 1985 to 1988, the number of inmates was well below the 405-person capacity planned for the new

jail. The average number of inmates in 1985 was 326 per day, decreasing to 321 per day in 1986, increasing to 370 per day in 1987 (the year construction of the new jail began) and 413 in 1988. Only in mid-1988 did the number of inmates begin to approach the number of available cells. Id. An average of more than 453 inmates per day, the single-celled capacity of the Nashua Street Jail, were committed to the Sheriff's custody in three out of the 24 months in 1988 and 1989. Id.

As a consequence of the order requiring only one inmate to be held in each cell at the Nashua Street Jail, the Sheriff has been required to establish a program to shift dozens of inmates to other jails in Massachusetts, to state prisons, and to facilities providing

alternatives to incarceration. A. 121,
210-213.^{8/}

The requirement that the Sheriff shift inmates from the Nashua Street Jail to jails in other counties and to state prisons requires that Suffolk County inmates be held in conditions inferior to those at the new Nashua Street Jail and exacerbates the crowding that exists in other correctional facilities across the Commonwealth. See, e.g., A. 118-120.^{9/} The consent

^{8/} These measures were taken in addition to other techniques, largely imposed by the state court, designed to cut to the bare minimum the number of persons to be housed at the jail. R. 389-401.

^{9/} The district court based its 1973 finding that the Charles Street Jail failed the constitutional test in part on the fact that its pretrial detainees

(footnote continued)

decree (and other consent decrees and judicial orders governing jails in other Massachusetts counties) reduce the Commissioner's ability to perform his statutory duty to set standards for county jails. Mass. Gen. Laws c. 124, § 1(d) (1988 Official Ed.).

Because the amended consent decree forbids more than one inmate per cell at the new Nashua Street Jail, many inmates are moved to other counties where they are held two or three-per-cell in smaller cells and in less modern

(footnote continued)

were kept in poorer conditions than convicted state prisoners. Pet. 35a. Because of severe overcrowding in state institutions in the interim, this situation has been reversed. A. 118-120, 210-212.

facilities than the Nashua Street Jail
A. 210-211. Those inmates who are
transferred to other counties also
generally live farther from their
families and attorneys. A. 211. The
transfer system, moreover, cost the
taxpayers of Suffolk County nearly
\$1 million in fiscal year 1990 alone.
A. 214.

The population-reduction program
also effectively permits the release or
escape of inmates who have been
determined by at least two judges to be
in need of pretrial detention. A. 212.
In order to reduce the inmate
population, the state court requires a
judge to review the status of inmates
whose bail already has been reviewed and
approved twice, and allows the judge to
release those inmates on their own

recognizance or to halfway houses.

R. 397-401, 778-782. One out of ten of those transferred to halfway houses escape from custody. A. 141. Inmates who escape present a public safety hazard. A. 115, 123-124, 213-214.

Decisions of the District
Court and Court of Appeals

The district court denied the Sheriff's motion for modification. Pet. 5a-14a. In addressing the motion, the district court made no reference to the plainly constitutional conditions at the new jail. Rather, it applied the standard for modification in United States v. Swift & Co., 286 U.S. 106, 119 (1932) requiring a "clear showing of grievous wrong evoked by new and unforeseen conditions" in order to grant modification. Pet. 8a. The district

court ruled that the change in law claimed by the Sheriff was insufficient to support modification because no prior precedent on which the district court relied had been overturned since the 1979 consent decree. Pet. 10a. The district court ruled that the change in circumstances claimed by the Sheriff was insufficient because "the overcrowding problem faced by the Sheriff is neither new nor unforeseen," id., although it did not explain how the Sheriff should have been able to predict the increase in crime and in the inmate population.

The district court also purported to address modification under a "flexible standard," as suggested by the Sheriff. — The court ruled that even under its interpretation of that standard it would deny modification because "The proposed

modification would violate one of the primary purposes of the decree--to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards." Pet. 12a. The court stated that granting modification in this case would undermine incentives for consent decrees, and that if the Sheriff had to release inmates because the district court denied the modification, the responsibility would lie with "public officials having fiscal authority [who] have chosen not to provide adequate resources." Pet. 14a.

The United States Court of Appeals for the First Circuit affirmed in a four-sentence per curiam opinion, stating that "We are in agreement with the well-reasoned opinion of the

district court and see no reason to elaborate further." Pet. 2a.

SUMMARY OF ARGUMENT

The district court was required to modify the consent decree to permit double-celling because there is no constitutional violation at the new Nashua Street Jail. In the absence of a constitutional violation, there is no predicate for the district court to continue to control the jail's operation and the Sheriff should be allowed to administer the jail in accordance with his public duty as an elected local official. [Pp. 30-41]

The existence of a consent decree in this case did not enlarge the district court's power to control the operation of the jail or justify denial of the

motion to modify. The district court's equitable power cannot extend, even under a consent decree, beyond the limits set by the Constitution and federal law. Nor does the contractual aspect of the consent decree override the many reasons that require the district court to modify the consent decree: there is no remaining violation of federal law; the remedy intrudes upon the sheriff's discretion as a local official; and the remedy fails adequately to take into account the effect of increased inmate population on public safety and the public interest.

[Pp. 41-50].

The district court also erred in declining to modify the consent decree to reflect changes in the law regarding single-celling since entry of the decree

in 1979. This Court substantially clarified inmates' rights in Bell v. Wolfish and Rhodes v. Chapman, holding that in circumstances such as those in this case, the district court cannot require the Sheriff to hold only one inmate per cell. [Pp. 50-55]

Finally, the district court erred in refusing to modify the consent decree to address the explosive growth in the number of inmates since 1988. The district court should have modified the decree after weighing the harm to the Sheriff, who is barred from housing the increased inmate population in the new jail; the effect of the single-celling requirement on the public interest, public safety, public fiscal resources, and the inmates themselves; and the terms of the consent decree and

underlying law requiring only conditions of confinement that meet the constitutional minimum. This standard of modification, which has been applied successfully by the majority of circuits, properly balances the need for change and flexibility in institutional reform litigation against the desirability for finality, and preserves incentives to settle litigation.

[Pp. 55-75]

For these reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to the district court to modify the consent decree to allow double-celling.

ARGUMENT

- I. THE DISTRICT COURT COMMITTED AN ERROR OF LAW IN DECLINING TO MODIFY THE CONSENT DECREE BECAUSE THE NEW JAIL HAS NO CONSTITUTIONAL VIOLATIONS.

The district court erred when it denied the Sheriff's motion to modify the consent decree and chose instead to continue judicial control of important aspects of jail management. The district court should have granted the motion to modify because there is no constitutional violation at the new jail, nor is there any contention that conditions under the requested modification will violate the Constitution.

- A. The District Court Was Required To Modify the Consent Decree Because The New Jail Contains No Constitutional Violation.

In the absence of any finding of a current or prospective constitutional

violation at the new jail, there was no basis for the district court to limit the Sheriff's freedom to operate the new jail. Rather, the district court was required to modify the consent decree to permit double-celling.

There is no constitutional violation even alleged at the Nashua Street Jail. The Nashua Street Jail is a "state of the art" jail, the most modern in the Commonwealth. A. 209. It provides spacious, climate-controlled accommodations for inmates, with amenities including televisions, laundry facilities, visiting rooms, individual lockers for inmates' personal belongings, recreation areas, libraries and classrooms. A. 81-83, 136, 198. Inmates are permitted to be out of their cells 12 hours daily to use the 2,000 square foot day room in each modular

unit, the indoor and outdoor exercise facilities, or other facilities. A. 143, 195.

The Constitution imposes no absolute requirement that inmates be housed one per cell. Rhodes v. Chapman, 452 U.S. 337, 348 (1981); Bell v. Wolfish, 441 U.S. 520, 541 (1979). State and local officials may house two pretrial detainees per cell so long as the arrangement is related to a legitimate governmental need and not punishment. 441 U.S. at 539.^{10/} Like the jails

^{10/} In this case, the district court's 1973 findings that double-celling at the old Charles Street Jail was unconstitutional cannot be applied to the different conditions at the new jail. Moreover, Bell and Rhodes, decided several years after the district court's findings, significantly undermine the district court's rationale for finding double-celling at the old jail unconstitutional per se. Compare Pet. 26a-27a, 42a with 441 U.S. at 541-543, 452 U.S. at 348-350.

in which double-celling was found constitutional in Bell and Rhodes, the Nashua Street Jail is a new jail with cells of approximately 70 square feet. 441 U.S. at 541-543; 542 U.S. at 348-350. 11/

Because the unconstitutional conditions at the Charles Street Jail have been remedied and are not likely to recur, the district court must allow local authorities to resume control of the new institution -- the predecessor

11/ The inmates' only contention regarding conditions at the Nashua Street Jail is that the construction of the cell doors raises safety issues. A. 169-173, 184. They have not yet couched this contention in constitutional terms. The Sheriff adequately showed that these doors did not create a safety problem, A. 202-204; R. 300, 694-695, 785-798, and the district court made no finding on the issue.

of which previously had violated federal law.^{12/} The district court's power to enter and enforce a consent decree derives solely from the underlying violation of federal law. System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961) (ordering modification of decree to reflect change in underlying statute). "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." Swann v. Charlotte- Mecklenburg Board of Education, 402 U.S. 1, 16 (1971). "[T]he scope of the remedy is determined by the nature and

^{12/} This case is unlike United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953), and its progeny because there is no likelihood that defendants will "return to [their] old ways." Thus, in this case there is no mere voluntary cessation of arguably unlawful conduct.

extent of the constitutional violation." Milliken v. Bradley, 418 U.S. 717, 744 (1974) Cf. Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 637 (1991);^{13/} Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434 (1976) (when this Court's subsequent decision revealed that the agreed-to remedy went beyond the bounds of relief available from federal courts, the district court was required to amend the remedy to limit its enforcement

^{13/} This Court's decision in Oklahoma City substantially undercuts Swift by holding that, when the underlying federal wrong has been corrected, the consent decree must be vacated. 111 S.Ct. at 637. While the defendants have not yet moved to vacate the consent decree in this case, the principle supporting vacation a fortiori supports modification to allow two inmates per cell.

powers to those allowed by federal law).^{14/}

Thus, the district court committed an error of law in this case when it declined to modify the consent decree as the Sheriff requested. The district court erred because the constitutional violation underlying the decree has disappeared and will not recur, so there is no constitutional violation to serve as a predicate for the federal court's

^{14/} In cases with facts very similar to this case, two courts of appeals ordered modification of consent decrees, in light of the decisions in Bell and Rhodes, so that the remedies under consent decrees would be coextensive with injunctive remedies available from federal courts following trial. Newman v. Graddick, 740 F.2d 1513, 1521 (11th Cir. 1984) (remanded to consider whether conditions of confinement meet constitutional standards, not consent decree requirements); Nelson v. Collins, 659 F.2d 420, 428-429 (4th Cir. 1981) (en banc) (directing district court to modify to allow two inmates per cell).

continued exercise of its equitable power.

B. The District Court Violated Principles of Federalism by Failing to Modify the Decree.

The district court transgressed important constitutional principles of federalism in denying the motion to modify. Federal courts generally are limited to enforcing the Constitution and federal law. Constitution, Art. III, § 2. This limitation has special significance with regard to federal court remedies against state and local officials. See, e.g., Younger v. Harris, 401 U.S. 37, 44 (1971).^{15/}

^{15/} See also, Note, Federalism and Federal Consent Decrees Against State Governmental Entities, 88 Col. L. Rev. 1796, 1802-1812 (1988).

This Court repeatedly has cautioned federal courts to be mindful of their duty, grounded on bedrock principles of federalism, to exercise their equitable powers to minimize interference with the day-to-day workings of state and local governments. See Rizzo v. Goode, 423 U.S. 362, 379 (1976); O'Shea v. Littleton, 414 U.S. 488, 501 (1974). Federal courts must avoid orders that unduly limit state and local administrators' discretion. See Kasper v. Board of Election Commrs. of Chicago, 814 F.2d 332, 338, 340 (7th Cir. 1987) (declining to enter consent decree requiring federal court supervision of local elections); Lelsz v. Kavanagh, 807 F.2d 1243, 1252, reh. denied 815 F.2d 1034 (5th Cir.) cert. dismissed 483 U.S. 1057 (1987) (modifying consent decree to

minimize interference with operations of state facilities for mentally retarded); See also, Sansom v. Lynn, 735 F.2d 1535, 1543-1545 (3d Cir.) (Becker, J., concurring) cert. denied 469 U.S. 1017 (1984).

In light of this special sensitivity to local autonomy, this Court also repeatedly has cautioned the lower courts to avoid interference with local operation of jails and prisons. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 584-585 (1984).

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are

ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Procunier v. Martinez, 416 U.S. 396, 404-405 (1974).

The district court violated those principles by refusing to modify the decree to permit single-celling. State and local officials have complied with the consent decree by building the new jail -- at the expense of the Commonwealth -- and operating it within the confines of the decree, except for this request to modify. By denying the requested modification, the district court has hamstrung the operation of the jail in a manner that threatens public safety and strains the statewide correctional system. The court has interfered unduly with important parts of the operation of a local facility at

which there is no constitutional violation.

C. The Terms of the 1979
 Consent Decree Neither
 Enlarge the District Court's
 Powers Nor Support Perpetual
 Single-Celling.

The mere fact that the parties in this case signed a consent decree in 1979 neither enlarges the district court's equitable power nor justifies denial of the motion to modify. The parties could not, by consent, enlarge the district court's equitable powers, because those powers are subject to constitutional limits on federal court jurisdiction and to principles of federalism. "[A] federal court is more than a recorder of contracts from whom parties can purchase injunctions. . ."
Local No. 93 v. Cleveland, 478 U.S. 501, 525 (1986) (internal quotation marks

omitted).^{16/}

The inmates' argument, if successful, would allow the parties to a lawsuit to determine the scope of the federal courts' equitable jurisdiction. According to the inmates, the district court must enforce a standard of conduct not required by the Constitution merely because that standard is embodied in the consent decree.^{17/} The inmates'

^{16/} See also Note, 88 Col. L. Rev. at 1804.

^{17/} Commentators have expressed doubt about public officials' power to bind themselves by consent decree to promises they could not otherwise bind themselves to perpetually. Shane, Federal Policy Making By Consent Decree, 1987 U. Chi. Legal F. 241, 267; Rabkin & Devins, Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government, 40 Stan. L. Rev. 203, 245 (1987). See also United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977) (State may alter its contractual

(footnote continued)

argument places the consent decree in a superior position to the jurisdictional limitations set by the Constitution and federal statutes.

This Court never has decided that consent decrees authorize federal courts to order state and local entities to perform acts not required by the Constitution or federal statutes. Contrary to the inmates' argument, Local No. 93, 478 U.S. at 525, merely held that a "federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial"

(footnote continued)

obligations unilaterally when "reasonable and necessary to serve the admittedly important purposes claimed by the State.")

(emphasis supplied). This statement only permits the court's entry of a decree consented to by all parties, which the parties agree to follow to remedy an ongoing federal law violation. The Court stated specifically that a stricter standard applies to requests for modifications, id. at 528, and thus Local 93 does not apply in this case. The constitutional violation in this case has been remedied and the governmental defendants have withdrawn their consent, yet the district court seeks to continue to supervise operation of the new jail.^{18/}

^{18/} Courts have held, and commentators have asserted, that judicial power may not be used to enforce consent decrees that go beyond courts' equitable powers. Lelsz, 807 F.2d at 1254;

(footnote continued)

In this case, the district court erred in denying the request for modification, placing undue emphasis on the contractual aspect of the consent decree. Pet. 12a. The district court incorrectly concluded that "The proposed modification would violate one of the primary purposes of the decree -- to

(footnote continued)

Handschu v. Special Services Div., 787 F.2d 828, 833 (2d Cir. 1986); Alliance to End Repression v. Chicago, 742 F.2d 1007, 1016 (7th Cir. 1984) (en banc); Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1131 (D.C. Cir. 1983) (Wilkey, J., dissenting) cert. denied, 467 U.S. 1219 (1984); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 39; McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal F. 295, 325.

provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards." Id.

Because modification is a judicial act, the district court must look to its own power, not to the contractual aspect of the consent decree, to determine whether to provide relief. System Federation, 364 U.S. at 651. In this case, the law does not permit the federal court to require single-celling in the absence of a predicate constitutional violation. Also, the terms of the consent decree in this case require the district court to refer to underlying constitutional principles in assessing modification. The consent decree was not designed to provide accommodations that meet agreed-upon

standards, but rather to provide inmates with a "suitable and constitutional jail" based on an architectural program that is "both constitutionally adequate and constitutionally required." Pet. 15a-16a. In this case, the terms of the decree and of the underlying law both dictate that the current constitutional conditions at the new jail should be the basis for the district court's decision on the motion for modification.

The district court improperly gave controlling weight to the contractual aspect of the consent decree, so that every "benefit" for which the inmates "bargained" could never be changed. Id. at 12a. The logic of the district court's position goes much too far, foreclosing any modification that would alter the agreement of the parties in

more than an incidental way and ignoring the equitable aspect of modification. When addressing a proposed modification, the district court is exercising its equitable powers. In that context, the contractual aspect of consent decrees cannot outweigh other important interests inherent in public law litigation.^{19/} Here, the most important of these interests is that the constitutional violation underlying the consent decree has been fully cured, so that the decree inappropriately intrudes upon the Sheriff's public duty to manage the jail as he sees fit.

^{19/} The terms of the decree are relevant to interpretation, United States v. ITT Continental Baking Co., 420 U.S. 223, 236-237 (1975), but much less relevant to modification, Firefighters v. Stotts, 467 U.S. 561, 578-581 (1984).

"The court here failed to recognize that the central goal of the decree is to provide constitutional prison conditions, and instead focused inappropriately on the double-celling provision." Plyler v. Evatt, 846 F.2d 208, 212 (4th Cir.) cert. denied 488 U.S. 897 (1988). "And in considering the impact on the inmates who would be double bunked if the decree was modified, the judge could not properly assign controlling weight to the inmates' preference for single cells: that is, for accommodations superior to those of many and perhaps most inmates in American jails . . ." Duran v. Elrod, 760 F.2d 756, 760 (7th Cir. 1985). The contractual aspect of the consent decree must be weighed with factors such as the increased number of

inmates, changed legal doctrines governing jails, the effects of the consent decree on the democratic process, and the public interest, all factors discussed in more detail subsequently in this brief.

The district court thus erred in denying the motion for modification because the contractual aspect of the consent decree does not broaden the district court's equitable jurisdiction and does not override all other considerations in assessing the modification.

D. The District Court Erred
By Failing to Modify the Consent
Decree Based on a Change in Law.

The district court also was required to grant the Sheriff's motion to modify the consent decree because of changes in

the underlying law. Since the consent decree was executed in 1979, the underlying law governing constitutional conditions of confinement has changed substantially. Bell v. Wolfish, 441 U.S. 520, and Rhodes v. Chapman, 452 U.S. 337, substantially clarified the law regarding the constitutionality of housing two pretrial detainees per cell.

A significant change in the law underlying a consent decree, which alters the basis of the parties' agreement or the court's authority to enter the decree, justifies modification of a decree. System Federation, 364 U.S. at 651.^{20/} Because a court's

^{20/} See also Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv.L. Rev. 1020, 1035 (1986) ("Because the Constitution
(footnote continued)

authority for entering the decree springs from the underlying violation of law, the court's authority to enter and enforce the decree is circumscribed by a change in that law. In response to an appropriate motion by a party subject to the decree, the court should modify the decree to reflect that change. Id.^{21/}

The limits inherent in federal court treatment of consent decrees were addressed in Pasadena, 427 U.S. at 434,

(footnote continued)

sketches rights only in general terms and because their content can change in extreme and even unpredictable ways, plaintiffs [and defendants] should not be locked into relief plans that reflect earlier understandings of rights.")

^{21/} The First Circuit has applied this principle narrowly, requiring that prior law be "directly overrule[d]" to justify modification. Pet. 10a, citing Coalition of Black Leadership v. Cianci, 570 F.2d 12, 16 (1st Cir. 1978).

an action charging that a public school system discriminated on the basis of race. The district court interpreted the agreed remedy to require annual reassignment of students to achieve racial balance. This Court held that the remedy could not require annual student reassignment to achieve racial balance because such a drastic remedy went beyond the bounds announced in Swann, 402 U.S. 1, which was decided after the Pasadena decree was entered. Accordingly, this Court remanded with instructions to modify an agreed remedy which went beyond the permissible scope of federal remedies.

Applying the same principle to this case, the district court lacks the power to require the housing of one inmate per cell at the Nashua Street Jail. The

district court cannot enforce that remedy because it exceeds any remedy available under federal law according to Bell and Rhodes. The consent decree therefore should be modified to reflect that change. See Newman, 740 F.2d at 1521; Nelson, 659 F.2d at 429.

Because of the significant change in law after the entry of the consent decree in this case,^{22/} this Court

^{22/} In this case, the inmates have made much of the date of the Sheriff's motion to modify, which came ten years after the decision in Bell. See Brief in Opposition to Certiorari at 22. To require parties to move for modification immediately upon a potential change of law, however, would require litigation when none might be necessary. The Sheriff did not move to modify until he knew he needed additional space for inmates. A. 138-139; see A. 243. Public officials should not be required, in order to qualify for modification, to burden the court with anticipatory motions to modify in the absence of an actual need for modification of a decree.

should remand this matter to the court of appeals with instructions to modify the consent decree to conform with current federal law.

II. THE DISTRICT COURT COMMITTED AN ERROR OF LAW BY REFUSING TO MODIFY THE CONSENT DECREE BECAUSE OF THE DRASTIC INCREASE IN INMATE POPULATION.

A. The District Court Was Required To Modify The Consent Decree Based On Changed Circumstances, The Public Interest, The Terms Of The Consent Decree, And Substantive Law.

The district court erred in failing to modify the consent decree because of the significant change of circumstances that has occurred since the consent decree was entered in 1979 and modified in 1985, and in applying the wrong standard for modification. If the Court

does not reverse because there is no constitutional violation at the new jail, as advocated in Argument I, it should reverse the decision of the court of appeals on this ground. In so holding, this Court should determine that consent decrees in cases involving public institutions and programs should be modified when:

- 1) there is a change in circumstances making application of the consent decree inefficient or inequitable;
- 2) the modification serves the public interest; and
- 3) the modification does not frustrate the purpose of the consent decree.

The standard is appropriate for modification in "public law litigation" involving the structure of public

institutions or programs.^{23/} It properly balances the need to modify public law consent decrees based on changed circumstances, new information and the public interest, against the goal of stability and predictability in settlement of litigation.

This public law standard, which is labeled the "flexible standard" by some circuits, has been in operation in many circuits for more than a decade. See, e.g., New York State Association for Retarded Citizens v. Carey,, 706 F.2d 956, 969 (2d Cir.) cert. denied 464 U.S. 915 (1983); Philadelphia Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1119-1120

^{23/} See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976).

(3d Cir. 1979) cert. denied 444 U.S. 1026 (1980).^{24/} At least seven circuits have adopted a standard for modification of public law consent decrees similar to that advocated in this brief. Carey, (2d Cir.); Shapp (3d Cir.); Plyler, Nelson (4th Cir.); Heath (6th Cir.); Duran (7th Cir.); Keith v. Volpe, 784 F.2d 1457 (9th Cir. 1986); Newman (11th Cir. 1986). The standard has proved workable, and no circuit has altered or abandoned the standard after adopting it.

"[F]lexibility is essential to the administration of comprehensive decrees

^{24/} In the correctional context, the public law standard has been applied in several cases to allow housing two inmates per cell, despite consent decree provisions that permitted only one inmate per cell. Duran, 760 F.2d 756; Heath v. DeCourcy, 888 F.2d 1105 (6th Cir. 1989); Nelson, 659 F.2d 420; Newman, 740 F.2d 1513; Plyler, 846 F.2d 208.

arising out of complex litigation."

Keith, 784 F.2d at 1460. The special character of public law litigation requires a different judicial approach to modification from that used in commercial and personal disputes. Because of the great likelihood of changed circumstances, improved remedial approaches, or unexpected consequences, the standard for modification must allow for relatively easy adaptation, so long as the basic purposes stated in the consent decree are preserved. Public law litigation involves the courts in continuous supervision of the operation of public institutions and programs, and the effectiveness of remedies depends upon the unpredictable future policies of public institutions and actions of

public officials.^{25/} As the Second Circuit has observed concerning public law litigation,

judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

Carey, 706 F.2d at 969 (Friendly, J.).^{26/}

^{25/} See Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1102 (1986); Note, Implementation Problems in Institutional Reform Litigation, 93 Harv. L. Rev. 428, 437 (1977).

^{26/} "The strong possibility that subsequent developments will render institutional reform relief outdated, ineffectual, or counterproductive

(footnote continued)

The public law standard permits modifications in response to unintended effects on identifiable third parties and the general public. In public law litigation, courts must be willing to modify consent decrees when their remedial orders have unexpected effects on nonparties. See Martin v. Wilks, 490 U.S. 755 (1989). In deciding whether to

(footnote continued)

presents a compelling case for flexibility in modification." Note, 99 Harv. L. Rev. 1034. See also Fiss, The Forms of Justice, 93 Harv. L. Rev. 1, 49 (1979) (remedy "must always be open to revision, even without the strong showing traditionally required for modification of a decree A revision is justified if the remedy is not working effectively or is unnecessarily burdensome.").

modify, the court must "consider not only the burden of the modification on the plaintiffs, and the benefits of the modification to the county government, but also the benefits and burdens to the public." Duran, 760 F.2d at 759. See also Plyler, 846 F.2d at 213 (both modifying consent decrees to allow two inmates per cell based, inter alia, on public interest).^{27/}

The public law standard for modification adequately protects the underlying purposes of the consent decree. The standard allows modification only when it does not frustrate the purposes of the decree,

^{27/} See also Jost, 64 Tex. L. Rev. at 1148-1149; Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 104.

thus preserving the essential elements of the parties' bargain while allowing alterations of specific elements of relief the decree may provide. When a district court addresses modification, it should look to underlying substantive law to determine the purpose of the decree. Because modification is a judicial act, and because action by the court must be based in underlying substantive law, System Federation, 364 U.S. at 651, the rights conveyed by law are the best source for determining the purpose of the decree.

B. The Public Law Modification
Standard Properly Allows
Public Officials to Fulfill
Their Duties.

The public law standard for
modification of consent decrees gives

proper weight to the responsibilities of elected and appointed executive and legislative officials to fulfill their responsibilities within the confines of constitutional and legislative mandates. The more rigid Swift standard freezes the consent decree, straitjacketing public officials' policy choices, derailing legislative budgetary prerogatives, and disregarding the special responsibilities of elected officers.^{28/}

^{28/} In lengthy cases, public officials currently bound by consent decrees generally were not in office at the time of the consent decree and thus have no direct responsibility for the wrongs to be redressed by it. See, e.g., Newman, 740 F.2d at 1517 (consent decree requiring significant prison reform signed on state administration's last day in office binds successor administration).

The control of public institutions and programs should lie with the public officials who are elected or appointed to operate them; the public law standard permits public officials to retain a measure of control through the process of consent decree modification. It permits public officials to seek modifications when they find methods to solve the problems addressed by the consent decree that are cheaper, more efficient, less disruptive of other governmental functions, or more harmonious with new policies.

Under the Swift standard applied by the First Circuit, public officials will be reluctant to enter into consent decrees because doing so binds them (and their successors) permanently with little chance to modify their

obligations. The Swift standard may lock public officials into outmoded remedies, constrict their choices of policy, and commit them to unnecessary expenditures.

These considerations underlie the United States Department of Justice's self-imposed limitations on entering consent decrees that unduly cede executive policymaking authority or legislative budgetary authority. See Memorandum of Attorney General Edwin Meese III, Department Policy Regarding Consent Decrees and Settlement Agreements, reprinted in Dep't of Justice Manual § 4-2.100A (1987 ed.) reprinted in part at 54 U. S. L. Week

The public law standard avoids the problems of Swift by providing incentives for litigants, including public officials, to settle litigation involving public institutions and programs. When public officials can be

^{29/} Commentators have warned of the antidemocratic potential of the consent decree: "It allows one administration to commit its successors to policies they might not otherwise have chosen. And it presents the risk that major policy decisions will be fixed in secret negotiations with small groups of private plaintiffs. . . ." Rabkin & Devins, 40 Stan. L. Rev. at 204 (1987). See also Easterbrook, 1987 U. Chi. Legal F. at 33; McConnell, 1987 U. Chi. Legal F. at 297; Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1294 (1983) (discussing "the problem of defendants who would like to lose" to obtain budgetary resources or policy preferences). Cf. Rhodes, 452 U.S. at 360 (Brennan, J., concurring) (quoting New York City Commissioner of Corrections stating "I look on the courts as a friend" in obtaining prison reform).

certain that consent decrees will be adaptable to change, they will be more amenable to settlement of litigation regarding public institutions and programs. Shapp, 602 F.2d at 1120.^{30/} Plaintiffs in public law litigation also retain incentives to settle, because settlement eliminates the risk and cost of trial and, more important, allows the litigants to have significant control over the relief to be afforded them. The ability to shape the remedy gives plaintiffs significant reasons to settle.^{31/}

^{30/} See also Anderson, Implementation of Consent Decrees in Structural Reform Litigation, 1986 U. Ill. L. Rev. 725, 755-756.

^{31/} See also McConnell, 1987 U. Chi. Legal F. at 307.

The public law standard also protects judicial legitimacy in "institutional" litigation. Judicial credibility is undermined when courts are seen to interfere unduly with the operation of executive programs.

Fletcher, The Discretionary

Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J.

635, 659 (1982).^{32/} Public law

litigation often involves the judicial branch in matters generally left to the discretion of executive branch officials

^{32/} See also Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 103-105 (1979); Chayes, 89 Harv. L. Rev. at 1314. See Coffin, The Frontier of Remedies: A Call for Exploration, 67 Calif. L. Rev. 983, 988 (1979) (appellate judge in this case admits unusual role of district court and court of appeals in forcing settlement.)

such as prison administration, Duran, Plyler, or operation of mental hospitals, Carey. It also may involve the federal courts in matters generally left to state and local governments. See Milliken, 433 U.S. at 282. Courts are neither expert in these areas nor institutionally well suited to operate institutions normally governed by elected officials.^{33/} The public law standard decreases the appearance of illegitimacy because it allows courts to adapt prior consent decrees to meet new realities. Adoption of the public law standard decreases the possibility that courts will be identified as improperly interfering with executive and popular will.

^{33/} See Diver, 65 Va. L. Rev. at 103-105; Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 398-400 (1978).

C. Under The Public Law
Standard, Changes Of
Circumstances In This Case
Require This Court To Remand
With Direction To Modify.

Applying the proper standard, the district court should have modified the consent decree because of the significant change in circumstances, because the public interest is served by the modification, and because the modification preserves the purpose of the consent decree. The increased inmate population must be considered a significant change in circumstances. Inmate populations now and in the recent past are much higher than the projections included in the consent decree and the populations contemplated at the time the inmates moved to modify the consent decree in 1985. Compare A.

243 with A. 69, 91. The parties' mutual assumptions about inmate populations, stated explicitly in the consent decree and in the inmates' 1985 motion to modify that consent decree, proved to be incorrect. See A. 69, 91. To modify the decree as requested by the Sheriff properly would adapt it to these changed circumstances.

The requested modification also protects public safety and the public interest by allowing the Sheriff to incarcerate those inmates whom judges determine should be remanded to his custody prior to trial. If the modification is granted, the Sheriff will have capacity to house nearly 100 more inmates than have ever been committed to his custody in the past. A. 243. He will no longer need to

distribute them to state prisons and other counties' jails, hold them in less secure settings than their classifications warrant, or release them altogether.

The modification the Sheriff seeks also comports with the purpose of the consent decree. The modification makes the consent decree coterminous with applicable law, bringing it into harmony with the limitations on the district court's authority over state and local officials. Also, the modification complies with the terms of decree itself, to "provide, maintain and operate . . . a suitable and constitutional jail for Suffolk County pretrial detainees." Pet. 15a. There is no dispute that inmates housed in the new Nashua Street Jail, with its modern

facilities, will live in circumstances well above the constitutional minimum required by the terms of the consent decree, even after modification.

In this case, modification also is necessary to protect the interests of inmates outside the plaintiff class. Without modification, excess inmates committed to the Sheriff's custody will be held in accommodations significantly less hospitable than if they were held two per cell at the Nashua Street Jail. A. 139-140. If the modification is not granted, excess inmates will continue to be housed two per cell in facilities outside Suffolk County, all of which are older and contain fewer amenities than the Nashua Street Jail, as well as being further from inmates' families and attorneys. A. 139-140, 210-211. The

modification plainly will promote the purpose of the consent decree by providing superior accommodations for those inmates.

The consent decree should be modified because the great increase in inmate population makes compliance burdensome and inequitable for the Sheriff, because the modification promotes public safety and promotes the public interest, and because the modification is consistent with the purpose of the decree -- to provide constitutional conditions of confinement for the inmates. Under the public law standard for modification of consent decrees, this Court should remand this case to the Court of Appeals with instructions to modify the consent decree as requested by the Sheriff.

CONCLUSION

For the reasons stated in this brief, the Court should vacate the decision of the United States Court of Appeals for the First Circuit and remand the case to that court with instructions to direct the district court to modify the consent decree to permit two inmates per cell at the Nashua Street Jail.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF THE COMMONWEALTH
OF MASSACHUSETTS

Jon Laramore
Thomas A. Barnico
Douglas H. Wilkins
Counsel of Record
Assistant Attorneys General
One Ashburton Place
Room 2019
Boston, Massachusetts 02108
(617) 727-2200

DATED: April 12, 1991



Nos. 90-954; 90-1004

Supreme Court, U.S.

FILED

APR 15 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

Robert C. Rufo

CHESTER A. JANIAK
Counsel of Record

THOMAS D. BURNS
PETER J. SCHNEIDER
ANN E. MERRYFIELD
WALTER M. FOSTER
BURNS & LEVINSON

125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

ROBERT C. RUFO
200 Nashua Street
Boston, Massachusetts 02114
(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County

QUESTION PRESENTED

Should requests to modify consent decrees which govern the administration of important public institutions such as jails or prisons be subject to: (a) the "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), (b) a "flexible standard" adopted by the majority of the Circuit Courts of Appeals that considers both the unique features of public institutions and important principles of federalism, or (c) a new standard adopted by the First Circuit in this case that is even more stringent than the "grievous wrong" standard?



PARTIES TO THE PROCEEDING

The petitioners are Robert C. Rufo, Sheriff of Suffolk County, Massachusetts and the Mayor of Boston, Massachusetts (No. 90-954); and Thomas C. Rapone, Commissioner of Correction of Massachusetts (No. 90-1004).

The respondents are the inmates of the Suffolk County Jail, a class of persons.

In addition, the following parties are inactive: City Council of the City of Boston; Deputy Commissioner of Capital Planning and Operations of Massachusetts; and Secretary of Administration and Finance of Massachusetts.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF LEGAL ARGUMENT	12
LEGAL ARGUMENT	13
I. THE STRINGENT <i>SWIFT</i> STANDARD SHOULD NOT BE APPLIED TO REQUESTS TO MODIFY CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION	13
A. The <i>Swift</i> Standard Applied By The Courts Below Does Not Foreclose A More Flexible Standard	13
B. The Particular Features Of Institutional Reform Litigation Require That A Flexible Standard Be Applied To Modification Requests	15
C. The Circuit Courts Have Rejected Or Distinguished <i>Swift</i> In Considering Modification Requests In Institutional Reform Litigation	19
II. CONTRACT PRINCIPLES DO NOT APPLY TO CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE	

TABLE OF CONTENTS (cont.)

USED TO DEFEAT A NEEDED MODIFICATION	21
III. PRINCIPLES OF FEDERALISM REQUIRE FLEXIBILITY IN THE SUPERVISION OF INSTITUTIONAL REFORM LITIGATION . .	23
A. Remedies Must Be Narrowly Tailored To The Underlying Constitutional, Statutory Or Regulatory Provision That Occasioned The Original Intervention	23
B. Remedies Imposed By Federal Courts Should Preserve The Autonomy Of And Defer To The Judgment Of State And Local Governments .	26
IV. THE CIRCUIT COURTS HAVE CONSISTENTLY RELIED ON CERTAIN FACTORS IN DECIDING WHETHER TO MODIFY A CONSENT DECREE	27
V. THIS COURT SHOULD ADOPT A FLEXIBLE STANDARD WHICH INCORPORATES PRINCIPLES OF FEDERALISM AND TAKES INTO ACCOUNT THE UNIQUE FEATURES OF INSTITUTIONAL REFORM LITIGATION . . .	31
A. The First Criterion	32
B. The Second Criterion	33
C. The Proposed Standard Preserves the Incentive to Enter Into Consent Decrees	36
D. The Proposed Standard Balances the Goals of Flexibility and Stability in the Administration of Consent Decrees	37

TABLE OF CONTENTS (cont.)

E. The Proposed Standard Appropriately Balances the Rights and Interests of the Parties	37
VI. UNDER THE PROPOSED STANDARD THE MODIFICATION REQUESTED BY THE SHERIFF SHOULD BE GRANTED	38
A. The Consent Decree Has Adversely Affected the Sheriff, Other Public Institutions and the Public Interest	38
B. The Limited Modification Requested Will Not Derogate From The Decree's Purpose of Providing A Constitutional Jail	40
CONCLUSION	44

TABLE OF AUTHORITIES

Cases:

<i>Attorney General v. Sheriff of Suffolk County</i> , 394 Mass. 624, 477 N.E.2d 361 (1985)	5
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	<i>passim</i>
<i>Board of Education of Oklahoma City v. Dowell</i> , ____ U.S. ____, 111 S.Ct. 630 (1991)	23, 26,34
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	14
<i>Donovan v. Robbins</i> , 752 F.2d 1170 (7th Cir. 1985)	28n
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985)	<i>passim</i>

TABLE OF AUTHORITIES (cont.)

<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 561 (1984)	24,25,26
<i>Heath v. DeCourcy</i> , 888 F.2d 1105 (6th Cir. 1989)	16,20, 28,29,30
<i>Keith v. Volpe</i> , 784 F.2d 1457 (9th Cir. 1986)	28n
<i>Local Number 93 v. City of Cleveland</i> , 478 U.S. 501 (1986)	25,25n,34
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	23,26,34
<i>Nelson v. Collins</i> , 659 F.2d 420 (4th Cir. 1981) (en banc)	17,20, 28,29
<i>New York State Association for Retarded Children, Inc. v. Carey</i> , 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983)	<i>passim</i>
<i>Newman v. Graddick</i> , 740 F.2d 1513 (11th Cir. 1984)	20,22,29
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974)	27
<i>Philadelphia Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3rd Cir. 1979), cert. denied, 444 U.S. 1026 (1980)	<i>passim</i>
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir. 1988), cert. denied, 488 U.S. 897 (1988)	<i>passim</i>
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	26
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	16,26,29
<i>Ruiz v. Lyndalgh</i> , 811 F.2d 856 (5th Cir. 1987)	21n,36
<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961)	22,24, 26,35,37
<i>Theriault v. Smith</i> , 523 F.2d 601 (1st Cir. 1975)	24,29,35
<i>Twelve John Does v. District of Columbia</i> , 861 F.2d 295 (D.C. Cir. 1988)	21n,29

TABLE OF AUTHORITIES (cont.)

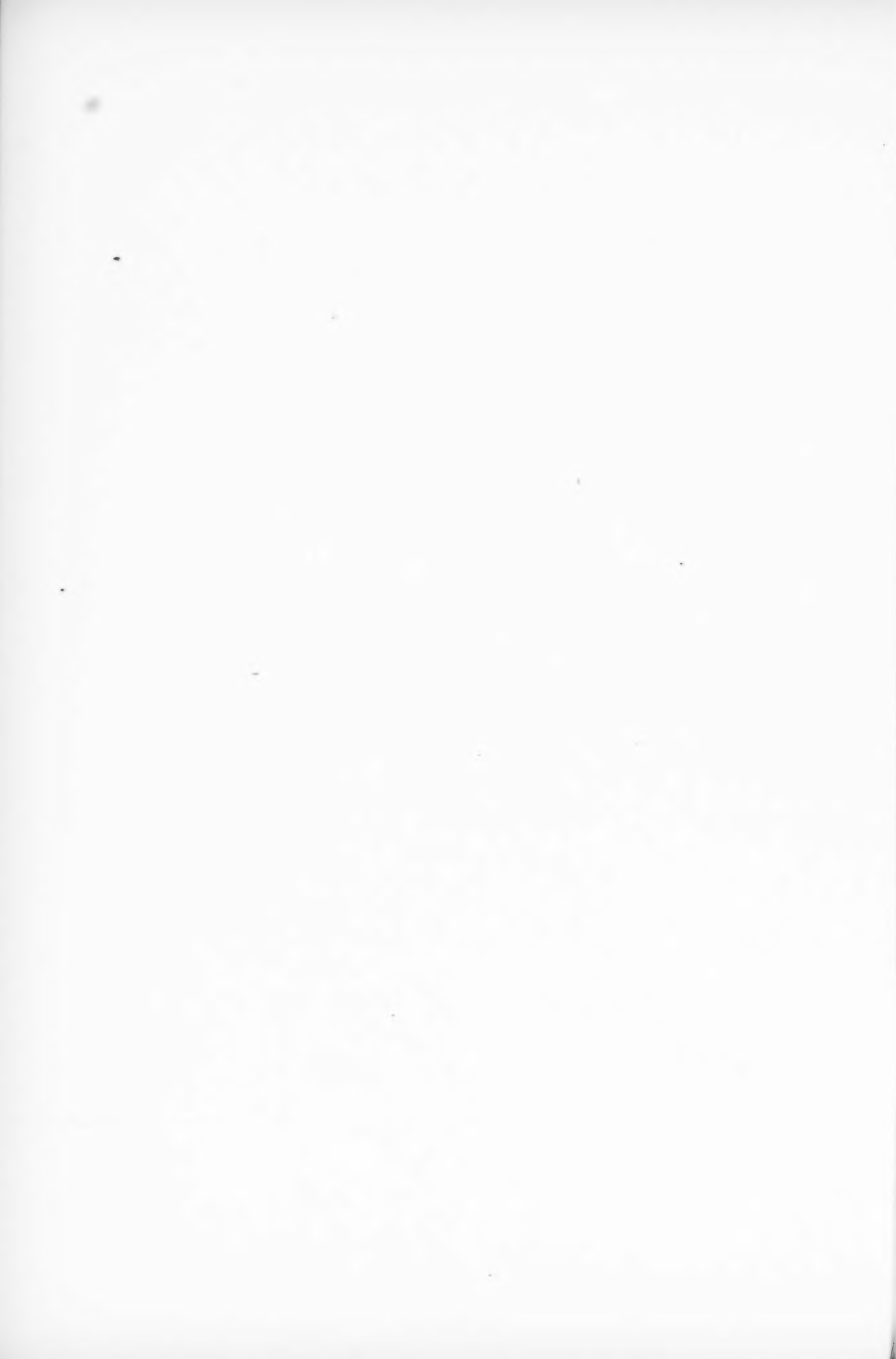
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932) . . .	<i>passim</i>
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	37
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982) . . .	24,27

Statutes:

Mass. Gen. L. Ann. ch. 34, §§ 3, 14 (West 1985) . . .	4n
Mass. Gen. L. Ann. ch. 268, § 20 (West 1990) . . .	9,17,38
Mass. Gen. L. Ann. ch. 276, § 52A (West 1972 & Supp. 1991)	5,9
Mass. Gen. L. Ann. ch. 276, § 58 (West Supp. 1991)	17,18,39
1985 Mass. Acts ch. 799	5

Periodicals and Publications:

Chayes, <i>The Role of the Judge in Public Law Litiga- tion</i> , 89 Harv. L. Rev. 1281, (1976)	15,20
Fiss, <i>The Supreme Court 1978 Term, Foreword: The Forms of Justice</i> , 93 Harv. L. Rev. 1 (1979) . . .	14,15,16
Note, <i>Implementation Problems in Institutional Re- form Litigation</i> , 91 Harv. L. Rev. 428 (1977) . . .	15,16
Jost, <i>From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts</i> , 64 Tex. L. Rev. 1101 (1986)	17



OPINIONS BELOW

The opinion of the Court of Appeals (Sheriff's Petition for Writ of Certiorari, hereinafter "Sheriff's Cert. Pet.," 1a) is unreported. The opinion of the District Court (Sheriff's Cert. Pet. 5a) is reported at 734 F.Supp. 561 (D. Mass. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered September 20, 1990. (Sheriff's Cert. Pet. 3a.) The Court of Appeals affirmed the District Court's denial of the petitioner's request to modify a consent decree. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Sections 1 and 5 to the Constitution of the United States provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The Original June 1973 Order

This action was initiated in the United States District Court for the District of Massachusetts in 1971, on behalf of the inmates of the Suffolk County Jail.¹ (First Circuit Record Appendix, hereinafter "F.C.R.A.," 6.) At that time, the Suffolk County Jail was located on Charles Street in the City of Boston and was known as the "Charles Street Jail." The inmates alleged that the conditions of their confinement violated the Eighth Amendment's prohibition against cruel and unusual punishment and the Due Process clause of the Fourteenth Amendment. (Sheriff's Cert. Pet. 24a.)

On June 20, 1973, the District Court issued an opinion and final judgment that the then existing conditions at the Charles Street Jail were unconstitutional and permanently enjoined the Sheriff of Suffolk County (hereinafter "Sheriff"), petitioner here, *inter alia*, "from housing at the Charles Street Jail after November 30, 1973, in a cell with another inmate, any inmate who is awaiting trial." (Sheriff's Cert. Pet. 48a.) In support of the injunction, the District Court made several findings regarding the conditions of confinement of pretrial detainees then existing at the Charles Street Jail, including the existence of antiquated cells with inadequate heat or air circulation; inadequate plumbing; nonfunctional toilets, sinks and showers; an infestation of rats, mosquitoes and other rodents and insects; unduly high noise levels throughout the jail; serious fire hazards due to a lack of exit pathways and no emergency backup electrical system; inadequate food supplies and clothing; and an over-crowded situation which taxed these meager services beyond their capabilities. (Sheriff's Cert. Pet. 25a-35a.) In light of these findings of fact, the District Court ordered that no pretrial detainees be held at the Charles Street Jail after June 30, 1976. (Sheriff's Cert. Pet. 48a.)

Suffolk County consists of the cities of Boston, Chelsea and Revere and the town of Winthrop.

The Consent Decree

In 1979, in order to comply with the court's June, 1973 Order, the parties entered into a Consent Decree to build a new high-rise Suffolk County Jail adjacent to the Charles Street Jail. (Sheriff's Cert. Pet. 15a.) The seven-page Consent Decree incorporates the "Suffolk County Detention Center, Charles Street Facility, Architectural Program" (the "Architectural Program"). (Sheriff's Cert. Pet. 16a.) The Architectural Program, a 110-page document, describes the functional spaces to be included in a new Suffolk County Jail for, *inter alia*, medical services, education, indoor and outdoor exercise, visitation, laundry and male and female housing. (F.C.R.A. 181-290.) The sections describing male and female housing units include provisions for showers, a dining area, telephone access, temperature, lighting and acoustical specifications and "single occupancy rooms." (Joint Appendix, hereinafter "J.A.," 72-87.)

The Consent Decree states, as the plaintiffs' "desire," that "as soon as possible, all present and future members of the class, including persons who will later become inmates of the Suffolk County Jail, will not be exposed to unconstitutional conditions of pretrial confinement." (Sheriff's Cert. Pet. 15a.) Defendants' stated their "desire" to "fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees," and "to house pretrial detainees at the existing 'Charles Street Jail' until a constitutional replacement can be provided." (Sheriff's Cert. Pet. 15a.) In the Consent Decree, the defendants agreed to "construct, maintain and operate, as applicable, a new facility for the detention of both males and females who are committed to the custody of the defendant Sheriff prior to, and pending their trials and de novo appeals." (Sheriff's Cert. Pet. 16a.) Single-celling is never mentioned in these statements of purpose or elsewhere in the Consent Decree itself, but only in the incorporated Architectural Program. (J.A. 73.) The parties to the Consent Decree explicitly

recognized the possibility of changing conditions and the continuing need to adapt the Architectural Program to the existing circumstances in paragraph five of the Decree, which states that the Architectural Program may be modified either by assent of both parties or by the Court. (Sheriff's Cert. Pet. 21a.)

The only factual assumption stated anywhere in the Consent Decree or Architectural Program is that the pretrial detainee population would decline throughout the 1980's and 1990's, and would be less than 230 by 1990. (J.A. 69.) This assumption was based on a population projection prepared at the direction of the City of Boston by an independent consulting firm. (J.A. 131.)

The 1984 State Litigation

By 1984, because of the inaction of the Mayor and City Council of the City of Boston, who collectively are the Suffolk County Commissioners, a new jail had still not been built, even though the contract bids were to have been awarded by January, 1981. (Sheriff's Cert. Pet. 21a.) In October, 1984, the Sheriff refused to accept into his custody persons for whom bail had been set in the district courts and Superior Court of Suffolk County, because he could not hold them in the Suffolk County Jail without double-bunking them. The Sheriff left these persons in the state courthouse lockups, thus precipitating a suit by the Attorney General against the Sheriff in the Massachusetts Supreme Judicial Court. (F.C.R.A. 302-08.) The Sheriff then filed suit in the Supreme Judicial Court (the "State Litigation") against the Mayor and the City Council to compel the construction of a new Suffolk County Jail.² (F.C.R.A. 309-16.) The Sheriff brought suit exclusively under state law to solve the dilemma created by his inability both to take pretrial detainees into his custody and, at the same time, to comply

²The Sheriff has no power, under state law, to appropriate capital or operating funds and is dependent upon funds provided him by the Suffolk County Commissioners, who at that time alone had appropriation power pursuant to Mass. Gen. L. Ann. ch. 34, §§ 3, 14 (West 1985).

with the District Court's June, 1973 Order prohibiting double-bunking at the Charles Street Jail.

Orders entered in the State Litigation compelled the Mayor and the City Council to construct a new Suffolk County Jail. *Attorney General v. Sheriff of Suffolk County*, 394 Mass. 624, 477 N.E.2d 361 (1985). In response to these orders, the state legislature provided funding for the new jail by enacting 1985 Mass. Acts. ch. 799. (F.C.R.A. 335-48.)

The Scheme Established For Coping With Inmate Commitments In Excess Of The Number Of Cells At The Charles Street Jail

The District Court, in addition to prohibiting double-bunking at the Charles Street Jail, also established certain mechanisms to accommodate the excess demand for jail space while a new jail was built. In the State Litigation, the Supreme Judicial Court added an additional mechanism to be used when the number of inmates exceeded the number of cells at the Charles Street Jail.¹ (F.C.R.A. 389-406.) Consequently, pending completion of the new jail, the Sheriff employed five mechanisms to maintain single-celling.

First, the District Court, in an order entered in November, 1973, permitted the Sheriff to transfer any pretrial detainee who had previously served a sentence in a correctional facility of the Commonwealth to a state correctional institution pursuant to Mass. Gen. L. Ann. ch. 276, § 52A (West 1972 & Supp. 1991). (J.A. 20.) When entering its November, 1973 Order, the District Court expressly noted that the state correctional system had extra cell space, that it could accommodate the inmates transferred, and that only the Commissioner of Correction had the resources (at that time) to provide accommodation for Suffolk County pretrial detainees, so that the Sheriff could comply with the single-celling requirement at the Charles Street Jail. (J.A. 13-17.)

¹ Orders of the Supreme Judicial Court of Massachusetts in the State Litigation are adopted as orders of the Federal District Court in this litigation, unless a party objects within thirty days. (J.A. 112.)

Second, the District Court's June, 1973 Order continued the "Bail Appeal Project" under which the Sheriff's legal staff expedites bail appeals on behalf of detainees held in the Sheriff's custody. (Sheriff's Cert. Pet. 54a.) Under the Bail Appeal Project, funded by Suffolk County, the Sheriff's legal staff performs all the preparatory work and provides counsel for hearings reviewing bails set at the time of arraignment in the district courts. These hearings must be held at the next regular sitting of the Superior Court of Suffolk County. (J.A. 212.) Upon motion of the Sheriff, the funding and staff of the Bail Appeal Project were substantially increased by an order entered in the State Litigation on January 9, 1985. (J.A. 140, 144.)

Third, the sheriffs of other Massachusetts counties have held Suffolk County pretrial detainees on a voluntary and space-available basis. (J.A. 138-40.) Most often, transferred inmates are double- or triple-bunked at these other county jails. *See* Brief of Amici Curiae filed on behalf of the individual Sheriffs of the other counties of Massachusetts at 2.

Fourth, if after exhausting the above three mechanisms, the inmate population still exceeds the number of available cells, the Sheriff must, pursuant to a procedure established in the State Litigation, transfer detainees to "halfway houses." (F.C.R.A. 389-406.) Under this procedure, the Sheriff must submit to a judge of the Superior Court sitting in Suffolk County a list of the names of inmates who are being held on bail. The judge must then reduce the bail of a sufficient number of inmates to release on personal recognizance so that the number of inmates no longer exceeds the number of cells. These inmates are then transferred from the maximum security jail to insecure halfway houses operated by private contractors. (J.A. 140-41, F.C.R.A. 391.)

Finally, if the inmates committed to the Sheriff's custody cannot be accommodated as set forth above, the judge is required to release inmates directly to the street.

The New State-Of-The-Art Nashua Street Jail

The new jail, ultimately constructed on Nashua Street in Boston (the "Nashua Street Jail"), was completed in May, 1990, at a cost of 54 million dollars. It is one of the most modern facilities of its kind in the country. (J.A. 209, F.C.R.A. 998-99.) The new Suffolk County Jail at Nashua Street includes a variety of functionally distinct spaces to meet the special needs of inmates and operate a correctionally sound pretrial detention facility. There are 282 cells divided into eight self-contained housing units for male inmates. Each housing unit contains two tiers of sixteen to nineteen cells, a "day room" where meals are served and detainees may spend their out-of-cell time, a separate "quiet" or "multi-purpose" room, counseling, noncontact visiting and attorney-client rooms, a washer and dryer for personal laundry, a kitchenette for serving meals prepared in the central kitchen, two televisions, weight-lifting equipment, telephones for use by detainees and access to an outdoor recreation deck shared with the adjoining housing unit. (J.A. 136-37.)

In addition, there are units for housing female detainees, intake and classification of male inmates before assignment to a housing unit (thirty-five cells), administrative and disciplinary segregation (sixty-six cells) to hold male inmates who pose a threat to jail officers or other inmates, protective custody (eight cells) to hold male inmates who are in need of additional protection from fellow inmates, and infirmary, psychiatric observation and suicide prevention (twenty-two cells). (J.A. 134.)

The jail also contains a contact visiting area, chapel, general library, classroom space for use by inmates, access to legal materials and a large central gymnasium complete with weight lifting and exercise equipment. Because of the modern, expanded facilities at the new Nashua Street Jail, there are extended visiting hours seven days a week, including holidays. Also, all areas of the jail are climate-controlled. (J.A. 133-37.)

In contrast, the old Suffolk County Jail at Charles Street, aside from five infirmary cells, contained none of these functionally distinct spaces. None of the conditions the District Court found to exist at the Charles Street Jail which served as the predicate for the inmates' lawsuit are present at the Nashua Street Jail. (F.C.R.A. 687-92.)

The Sheriff's Modification Request And The Decision Below

As constructed, the Nashua Street Jail has a total of 453 cells. Although the Consent Decree originally provided for only 309 cells, the Decree was modified in 1985 to increase the number of cells to accommodate what appeared to be a moderate increase in jail population.⁴ By the time construction began on the new Nashua Street Jail in September, 1987, it appeared that the 453 cells then planned were more than adequate to accommodate further increases in population.⁵

Unfortunately, the Consent Decree's factual assumption of a declining inmate population and the assumption made when the number of cells was increased were inaccurate, and the number of cells in the new Nashua Street Jail is now insufficient to house what became an explosion in the jail population. That explosion, however, was not evident until well after the con-

⁴In 1985, the Decree was modified to increase the number of cells from 309 to 435 (405 male, 30 female cells). (J.A. 110.) When the site for the jail was moved from Charles Street to Nashua Street and changed from a high-rise to a seven-story structure, the new site allowed construction of 453 cells (413 male, 40 female cells). At that time, a number of additional amenities not required by the Architectural Program were added, including construction of six recreation decks rather than one rooftop recreation deck as originally planned.

⁵During 1985, the daily average number of male detainees committed to the Sheriff's custody ranged from 284 to 352, averaging 326 for the year, substantially less than the increased number of cells planned for the new jail. The daily average number of male detainees in 1986, 321, was lower than the 1985 average. In addition, the daily averages at the end of 1986 had declined or remained constant compared to the beginning of the year. Although the daily average increased somewhat in 1987 to 370, the numbers continued to be substantially less than the then-planned 405 cells for the male inmates at the new jail. (J.A. 243.)

struction on the new jail was underway. Only in July, 1988, ten months after construction began, did the number of pretrial detainees exceed 400 and begin to approach the number of cells in the new jail. (J.A. 243.)

Moreover, as the inmate population expanded in Suffolk County, it also expanded in other counties and in the state prison system, undermining the scheme established for accommodating inmates committed to the Sheriff's custody in excess of the number of cells. Inmates transferred under Mass. Gen. L. Ann. ch. 276, § 52A to state correctional facilities were being held in prisons that were operating at well in excess of their planned capacity. Indeed, by May, 1989, these facilities were at 185% of capacity. (J.A. 259.) Also, other county facilities, to which the inmates were transferred, including those counties geographically adjacent to or near Suffolk County, were subject to caps imposed by federal or state court orders. (F.C.R.A. 427-70.) Consequently, to comply with the Consent Decree's double-bunking prohibition the Sheriff has to transfer pretrial detainees to distant counties at a cost of close to one million dollars per year in transportation costs alone. (J.A. 214.)

Release to halfway houses had also become an inappropriate alternative to holding detainees in the county jail because at least 10% of the detainees walk away from these insecure facilities. (J.A. 140-41.) The marked increase in the pretrial detainee population had created a conflict between the Sheriff's obligation to hold all the inmates committed to his custody as imposed by orders of the court (*mittimus*) and by statute, Mass. Gen. L. Ann. ch. 268, § 20 (West 1990), and the Architectural Program's single-celling requirement. The Sheriff continues to be faced with these conditions and conflicting obligations.

In July, 1989, faced with increases in the pretrial detainee population and his inability to rely on the previously-established scheme, the Sheriff requested a modification of the Consent Decree to permit double-bunking 197⁶ of the 453 cells

⁶ In the Sheriff's original motion to modify, he requested to double-bunk 200 cells. This number was later decreased to 197. (J.A. 192-93.)

at the new Nashua Street Jail. This number was not chosen arbitrarily, but was chosen to provide at least thirty-five square feet of common, out-of-cell area per detainee in each of the regular housing units for male inmates, as recommended by standards promulgated by the American Correctional Association, and to maintain single-cell occupancy in those specialized units — intake and classification, administrative and disciplinary segregation, and infirmary and psychiatric care cells — where it is correctionally appropriate to single-cell. (J.A. 141-44, F.C.R.A. 96-97, 373-74.)

Under the Sheriff's double-bunking proposal, detainees would be out of their cells at least twelve hours per day⁷ and would not be assigned to be double-bunked until they had been classified as suitable for double-bunking based upon a comprehensive classification plan. This plan would classify an inmate for double-bunking after a caseworker interview, a medical examination and a review of the inmate's medical, probation and jail records and his behavior while in custody. (J.A. 143, 203-04, F.C.R.A. 762-69.)

Under the proposed modification, the Bail Appeal Project would continue, but the Sheriff would no longer be compelled to transfer detainees to state and county facilities where the inmates transferred would, ironically, be double- and triple-bunked. (F.C.R.A. 799-819.) Moreover, the Sheriff would not have to rely on the designated Superior Court judge to determine who, amongst all of the inmates whose bail has already been reviewed twice, may be released to halfway houses or to the street.⁸ The requested modification would ensure that the Sheriff has the ability to hold all the detainees committed to his custody, without releasing those inappropriate for release, while fully complying with all constitutional requirements.

⁷ In fact, the inmates are typically out of their cells over twelve hours per day if they have court appearances, attorney conferences, social worker interviews, etc.

⁸ Indeed, on four occasions, the Superior Court judge has refused, when presented with the list of detainees, to release any of the inmates, rendering the Sheriff unable to comply with the Consent Decree with no lawful alternative under state law.

In his request for modification, the Sheriff argued, *inter alia*, that:

(1) an increase in the number of detainees requires the Sheriff to double-bunk in order to administer his duties under the law;

(2) double-bunking only 197 out of the 453 cells would meet constitutional requirements;

(3) even with double-bunking, the purpose of the Consent Decree — to provide a constitutional jail for Suffolk County pretrial detainees — would be achieved; and

(4) this Court in *Bell v. Wolfish*, 441 U.S. 520 (1979), has held that the Constitution does not prohibit double-bunking pretrial detainees.

The District Court, in a Memorandum and Order issued on April 9, 1990, (Sheriff's Cert. Pet. 5a-13a), denied the Sheriff's Motion to Modify the Consent Decree, rejecting the Sheriff's argument that the Court's decision in *Bell v. Wolfish* changed the constitutional standards governing the conditions of confinement of pretrial detainees, and holding that *Bell* did not directly overrule any legal interpretation on which the 1979 Consent Decree was based. (Sheriff's Cert. Pet. 10a.)

The District Court held that the Sheriff did not meet the strict standard for modification of consent decrees set forth in *United States v. Swift & Co.*, 286 U.S. 106 (1932), rejecting the Sheriff's argument that increases in pretrial detainee population committed to his custody justified the proposed modification. (Sheriff's Cert. Pet. 11a.)

The Sheriff urged the court to adopt and apply a "flexible standard" for modification of consent decrees as developed in other circuits. In response, the District Court noted that, although the other circuits had adopted a "more flexible standard," the First Circuit had not. (Sheriff's Cert. Pet. 11a.) The District Court then purported to apply a "flexible standard," but in reality established an even more stringent standard than the *Swift* standard. The court reasoned that modification here would not be appropriate under the "flexible" standard that it defined, because it would violate one of the primary purposes

of the Consent Decree. (Sheriff's Cert. Pet. 12a.) Although the Consent Decree stated only that the parties "desired" a jail that met constitutional standards, the District Court found that the purpose of the Consent Decree was to provide conditions that "meet agreed upon standards," one of which was to hold only one inmate per cell. (Sheriff's Cert. Pet. 12a.) The District Court also reasoned that to permit such modifications would undermine and discourage settlements by consent decrees. (Sheriff's Cert. Pet. 12a.) Finally, the court explicitly rejected any consideration of public safety and fiscal restraints in making its determination. (Sheriff's Cert. Pet. 13a.)

The Sheriff then appealed the District Court's decision to the First Circuit, which affirmed the decision by an order and judgment entered on September 20, 1990. (Sheriff's Cert. Pet. 1a-4a.) The Sheriff's Petition for Certiorari was granted by this Court on February 19, 1991.

SUMMARY OF LEGAL ARGUMENT

This Court should adopt a flexible standard for consideration of motions to modify consent decrees in institutional reform litigation which would allow a modification if:

- (1) the consent decree has had a significant adverse effect on the public defendant or on a particular public interest which effect appears during the administration of the decree or arises from a change in circumstance; and
- (2) allowance of the requested modification would avoid the adverse effect without derogating from the purpose of the consent decree, as defined by the constitutional, statutory or regulatory provision that occasioned the court's original intervention and as that provision may have been further defined or clarified by subsequent judicial decisions or legislative action.

Unlike the stringent standard articulated by the Court in *United States v. Swift & Co.*, 286 U.S. 106 (1932), this flexible

standard is appropriate because it (1) accommodates the unique features of public institutions, (2) is consistent with fundamental principles of federalism which require courts to tailor remedies to the underlying federal law and to give deference to the autonomous functioning of state and local governments, and (3) is consistent with the decisions of the majority of the circuit courts that have considered the issue of the standard to apply to such modification requests.

Under this flexible standard, the modification the Sheriff requested should have been granted.

LEGAL ARGUMENT

I. THE STRINGENT *SWIFT* STANDARD SHOULD NOT BE APPLIED TO REQUESTS TO MODIFY CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION.

A. The *Swift* Standard Applied By The Courts Below Does Not Foreclose A More Flexible Standard.

In *United States v. Swift*, 286 U.S. 106 (1932), the Supreme Court considered the standard for the modification of consent decrees. In that antitrust case, the defendant meatpackers had entered into a consent decree prohibiting their involvement in several lines of business. In addressing the defendants' request for modification, the Court first noted that all consent decrees are subject to modification:

We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions, though it was entered by consent. . . . If the [power to modify] had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. *A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.*

Swift, 286 U.S. at 114 (emphasis added).

The Court then distinguished between decrees “that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change” and those “that involve the supervision of changing conduct or conditions and are thus provisional and tentative.” *Swift*, 286 U.S. at 114. Without stating the standard to be applied to a “provisional and tentative” decree, the Court applied a strict standard to the decree before it:

The inquiry for us is whether the changes are so important that the dangers, once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Swift, 286 U.S. at 119.

The Court in *Swift* distinguished between two types of decrees, but stated a modification standard to be applied only to one — a standard for modification requests brought by private parties with a propensity toward behavior that harmed the public interest. Because the facts were “substantially impervious to change,” the consent decree was necessary to protect the public from anti-competitive behavior well into the future. The interests of the public, therefore, would not be adversely affected by continuation of the decree as originally entered. Rather than mandating a stringent standard for reviewing modification requests in all cases, the Court recognized that certain types of decrees, unlike the one before it, would require flexibility to accomplish their purpose. *Swift*, 286 U.S. at 114.

Swift was decided in 1932, long before the Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), the first of what has since been termed “structural/institutional reform litigation.” See Fiss, *The Supreme Court 1978 Term, Fore-*

word: *The Forms of Justice*, 93 Harv. L. Rev. 1, 2 (1979) [hereinafter *The Forms of Justice*]. Since that historic decision, courts have been faced with the challenge of fashioning remedies to redress constitutional or statutory violations by public institutions, while still accommodating the inherent differences between these public institutions and private party litigants. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977) [hereinafter *Implementation Problems*].

The District Court and First Circuit below, however, failed to recognize the distinctions made in *Swift*. Instead, the District Court opinion, affirmed by the First Circuit, first applied the stringent *Swift* standard, and then, purporting to apply a "flexible" standard, in reality articulated a standard even more stringent than the *Swift* standard, because application of that standard would prohibit a needed change of any provision that was "agreed upon." (Sheriff's Cert. Pet 12a.) This standard would rob a court of its equitable power to make any necessary, substantive modifications.

B. The Particular Features Of Institutional Reform Litigation Require That A Flexible Standard Be Applied To Modification Requests.

Courts have recognized that when administering consent decrees that govern jails, prisons, mental hospitals, state and local health and welfare agencies, school systems and other public institutions, factors unique to these institutions, but not present in litigation involving private defendants like those in *Swift*, must be taken into consideration. Litigation involving public institutions, unlike litigation involving private parties, typically seeks to effectuate the long-term reform of public institutions to vindicate rights secured by federal law through the use of complex decrees that require ongoing judicial supervision. Note, *Implementation Problems*, 91 Harv. L. Rev. at

428; *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

The federal rights that institutional reform litigation typically attempts to redress — *e.g.*, the Eighth or Fourteenth Amendments — are not specific as to remedy. The right requires some minimal constitutional threshold for compliance, but a wide range of remedies would adequately vindicate that right, and the Constitution does not compel any particular remedy. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. at 49; Note, *Implementation Problems*, 91 Harv. L. Rev. at 438. The selection of a remedy, from the wide range of available remedies, and other considerations require that courts give deference to state or local officials when deciding upon a means for compliance. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (practical considerations favoring single over double-bunking in state prison are properly for the legislature and prison administration, not a court, to decide); *Bell v. Wolfish*, 441 U.S. at 547, 562 (1979) (prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices, and in determining which among a wide range of possible remedies to use to meet constitutional standards).

Over time, public officials gain knowledge and experience in the operation of their institutions when under a consent decree and need to “fine-tune” the decree in accordance with that newly-gained knowledge and experience. Moreover, public officials are often faced with a multitude of competing obligations and changes in circumstances over which they have no control but which affect their institutions. Nevertheless, officials must be able to change their policies to comport with any changes and competing obligations. *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989) (broad judicial deference is required in supervising consent decree involving a public institution to allow fine-tuning of goals with the benefit of time and experience, and to allow for more effective utilization of

government resources); *Nelson v. Collins*, 659 F.2d 420, 427 (4th Cir. 1981) (en banc) (state prison faced with changes in circumstances over which it had no control).

A further distinction between injunctive decrees involving public institutions and those involving private defendants is that public interests, in addition to the enforcement of rights under federal law, are implicated. *Duran v. Elrod*, 760 F.2d 756, 759 (7th Cir. 1985); *Plyler v. Evatt*, 846 F.2d 208, 211 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988). Although a remedy in institutional reform litigation may protect one public interest, *e.g.*, the vindication of a federally-secured right, it may also adversely affect other public interests. This adverse effect may first become apparent during the administration of the decree, *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1117-18, or may arise from a changed circumstance since the decree was entered. *Nelson v. Collins*, 659 F.2d at 424. There may then be continuing harm to the public interest, if a change is not made in the consent decree under which the institution operates. Thus, consent decrees should be modified if they cause injurious effects to the public interest. Jost, *From Swift to Stotts and Beyond: Modifications of Injunctions In The Federal Courts*, 64 Tex. L. Rev. 1101, 1149 (1986). Similarly, other public institutions may be affected by a consent decree, even though they are not parties to the decree and offered no "consent" or input into the decree.

This case presents an archetypal example of a consent decree intended to effect institutional reform, and the corresponding problems in administering the decree over time, in light of changing circumstances and competing obligations. The Sheriff is obligated by statute, Mass. Gen. L. Ann. ch. 268, § 20, to hold pretrial detainees and to produce them in court. The purpose for holding pretrial detainees is two-fold: first, to insure that those accused appear for trial, and second, to assure the safety of "any person or the community." Mass. Gen. L. Ann. ch. 276, § 58 (West 1972 & Supp. 1991). Both purposes benefit the public's interest in the efficient adminis-

tration of the criminal justice system and in being safe in their homes and on the street.

The Sheriff's ability to meet his obligations is affected by a number of factors, including the state's scheme, as set forth in the bail statute, Mass. Gen. L. Ann. ch. 276, § 58, for setting and reviewing bail; the nature of the crimes charged; the number of crimes and arrests within Suffolk County; the resources the state and City of Boston commit to constructing new jail facilities; the availability of space in jails in other counties, or in state correctional facilities, to which the Sheriff can transfer detainees; and the funds available to effect these transfers. The Sheriff has no control over these factors, but must operate within their confines, as well as within the confines of the Consent Decree.

At present, if the Sheriff cannot meet all of these obligations, a judge must release detainees on personal recognizance to halfway houses or to the street, undermining the crucial two-fold public interests at stake. (J.A. 211, F.C.R.A. 397-99.) The Sheriff, thus, is faced with the prospect of either being in contempt of the Consent Decree or being in violation of his duties imposed by state statute, the orders (mittimusses) of the Suffolk County courts and his oath of office to serve and protect the citizens of Suffolk County.

Because of the nature of institutional reform litigation, consent decrees should be supervised flexibly, both to achieve the broad federally-mandated rights the decree was intended to effect and to protect public officials, institutions and interests from the adverse effects of the decree. The courts below in the present case did not consider these distinguishing features or recognize the need for flexibility. Instead they applied the inappropriate *Swift* standard and a "flexible standard" that does not accommodate these distinguishing features, but forecloses the practical possibility of substantive change.

C. The Circuit Courts Have Rejected Or Distinguished *Swift* In Considering Modification Requests In Institutional Reform Litigation.

The circuit courts have either distinguished *Swift*, or completely rejected its stringent standard, in considering requests for modification of consent decrees in institutional reform litigation, because that stringent standard does not accommodate the unique features of the litigation. Instead, these courts have held that a more flexible standard is appropriate. The First Circuit, as noted in the District Court's opinion, has not adopted a flexible standard. (Sheriff's Cert. Pet. 11a.)

The consent decree in *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980), required the state of Pennsylvania to implement, pursuant to a timetable, a medical screening and outreach program. The state moved to modify the timetable. The Third Circuit distinguished *Swift* on two grounds. First, the proposed *Shapp* modification would keep in force most of the provisions of the decree and avoid the "evils" the decree was intended to eliminate. 602 F.2d at 1120. Second, the *Shapp* decree was an ongoing, complex decree that, despite good faith, could not be complied with due to circumstances beyond the defendants' control. 602 F.2d. at 1121. The court affirmed the grant of the requested modification.

The Second Circuit then followed with its decision in *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983). In *Carey*, the state defendants were ordered to relocate patients from a large and notorious mental institution to small residences with a maximum of fifteen beds. The state defendants moved to modify the decree to allow them to place certain patients in facilities with up to fifty beds. The court recognized that considerations unique to institutional reform litigation rendered the stringent *Swift* standard inapplicable. In particular, the court held that, in institutional reform litigation, judicially-

imposed remedies must be adaptable to improvement when a better understanding of the problem emerges and to accommodation of a wider constellation of interests than is represented in the courtroom. *Carey*, 706 F.2d at 969. In addition, the court held that in this type of litigation, the effect on those persons or interests not before the court should be considered. 706 F.2d at 969-70 (quoting Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976)).

At least six additional appellate courts have, following a flexible standard, considered the modification of consent decrees to allow double-bunking in jail or prison reform litigation, and have found the stringent *Swift* standard inapplicable.⁹ These courts have held that a modification is justified if the current remedy is not working effectively or is burdensome, and that a flexible standard that considers the risks to public institutions and interests as well as impositions on the prisoners is appropriate. In both *Nelson v. Collins*, 659 F.2d at 424, and *Newman v. Graddick*, 740 F.2d 1513, 1520, (11th Cir. 1984), the courts found the decrees to be the "provisional and tentative" type contemplated in *Swift*. In *Plyler v. Evatt*, 846 F.2d 208, 211-12, (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), the court held that the *Swift* standard was inappropriate because it did not consider the unique demands of institutional reform litigation. In *Heath v. DeCourcy*, 888 F.2d at 1110, the court also considered a request for modification of a consent decree to double-bunk a greater number of inmates to accommodate a rising prison population. Again, the court held that, because the effect of consent decrees reaches beyond the parties directly

⁹ The Seventh Circuit, in *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985), also considered a request to modify a consent decree so that the Cook County jail could be double-bunked for seven weeks until a new jail was opened. The court held that it need not consider whether a flexible standard should apply, because the defendants met even the stringent *Swift* standard. Citing federalism and the public interest as overriding concerns, the court found that new data on fugitives and recidivism constituted a new and unforeseen circumstance justifying double-bunking over early release. 760 F.2d at 762.

involved in the suit, a more flexible standard than the *Swift* standard, that balances private and public interests, should be applied.¹⁰⁰

The courts below did not apply any formulation of the flexible standard discussed in the majority of the circuit courts, but instead formulated and adopted an unprecedented standard and incorrectly labelled it as "flexible." (Sheriff's Cert. Pet. 11a-12a.)

II. CONTRACT PRINCIPLES DO NOT APPLY TO CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE USED TO DEFEAT A NEEDED MODIFICATION.

The District Court below improperly applied contract principles to the Sheriff's request to modify the Consent Decree. Although the circuit courts, in considering requests to modify consent decrees in institutional reform litigation, have consistently found unhelpful *Swift*'s stringent standard, they have, like *Swift*, also found arguments based on analogies to contract principles unhelpful. In *Swift*, the Court rejected the argument that:

a decree entered upon consent is to be treated as a contract and not as a judicial act The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should be necessary in adaptation to events to be.

Swift, 286 U.S. at 115.

¹⁰⁰ Even when denying a request to double-bunk, the courts in *Ratz v. Lemaire*, 811 F.2d 856, 861 (5th Cir. 1987) and *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988), recognized the need for a flexible standard in prison reform cases when considering requests to modify consent decrees.

Similarly, in *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961), the Court, in considering a motion to modify a consent decree, held that a consent decree should not be treated as a contract, but rather as a judicial act. The Court held that authority to adopt and modify a decree comes only from the underlying law which the decree is intended to enforce, and not from the parties. *Id.*

Following *Swift* and *Wright*, the courts have consistently rejected the argument that obligations imposed under a consent decree may not be changed or lessened because the parties had consented to them. In *Duran v. Elrod*, 760 F.2d at 760, the court held that, in deciding whether to modify a consent decree governing the operation of jails, a court cannot merely rely on the "sanctity of contracts." Instead, a court must consider the concrete impact of the modification on the public interest as well as on the parties to the case. *Id.*

Similarly, in *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir. 1988), *cert. denied*, 488 U.S. 897 (1988), the court held that a consent decree in a prison reform case is not an ordinary contract, but a compromise to provide constitutionally adequate prison conditions. The court held that consent decrees require a flexible approach to modification which may alter the original compromise. 846 F.2d at 212; *accord*, *Newman v. Graddick*, 740 F.2d at 1520 (consent decrees in prison reform litigation are judicial acts, not *inter partes* contracts).

Hence, the Sheriff here is not foreclosed from seeking a modification of the single-celling provision contained in the Architectural Program solely because his predecessor consented to the Program. The District Court's reasoning below that the decree could not be modified because it was an agreement upon "standards" is directly contrary to the consistent holdings of this Court and the circuit courts that consent decrees are not to be treated as contracts.

III. PRINCIPLES OF FEDERALISM REQUIRE FLEXIBILITY IN THE SUPERVISION OF INSTITUTIONAL REFORM LITIGATION.

This Court has articulated important principles of federalism and equity that define and limit a court's authority when fashioning remedies to redress constitutional or statutory violations. A court should also apply these principles in deciding a disputed modification request in institutional reform litigation.

A. Remedies Must Be Narrowly Tailored To The Underlying Constitutional, Statutory Or Regulatory Provision That Occasioned The Original Intervention.

A remedy must be intended to eliminate a condition that violates the constitutional, statutory or regulatory provision that occasioned the intervention, or to eliminate a condition flowing from such violation. In *Milliken v. Bradley*, 433 U.S. 267, 282 (1977), the Court noted this "inherent limitation upon federal judicial authority" flowing from "equitable principles" in holding that court-imposed remedies "exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."

In *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. 630 (1991), this Court applied this principle to a request to dissolve an injunction entered in a school desegregation case. This Court held that dissolution would be appropriate based on a finding by the district court that the unlawful conduct of the public officials had come to an end and was unlikely to be resumed, and because any existing residential or school segregation was due to other factors. *Dowell*, ___ U.S. ___, 111 S.Ct. at 638. Thus, when the condition that had occasioned intervention had been eliminated, local government control could be restored. *Dowell*, ___ U.S. ___, 111 S.Ct. at 637.

The principle that remedies be narrowly tailored to the underlying law has also led courts to consider changes in the law

when deciding requests to modify consent decrees or injunctions. In *System Federation No. 91 v. Wright*, 364 U.S. at 651, the Court allowed the modification of a consent decree when the underlying law which formed the basis for the decree, the Railway Labor Act, was amended, holding that a court must "be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives." In so holding the Court noted, "[t]he parties cannot, by giving each other consideration, purchase from a court of equity continuing jurisdiction." 364 U.S. at 651. The Court continued that the only source of a court's authority to adopt a consent decree is the law the decree was intended to enforce. *Id.*

The Court's reasoning in *Wright* is equally applicable to decisions clarifying or further defining constitutional provisions that form the basis of consent decrees. Judge Friendly, in *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 971, applied the *Wright* analysis to the request for modification pending before the court to determine the effect of the ruling in *Youngberg v. Romeo*, 457 U.S. 307 (1982). The court held that the change of law set forth in *Youngberg* clarifying the deference to be given to the professional judgment of the administrators of public institutions must be considered by a court when determining whether to permit the change in remedy proposed. Judge Friendly stated, "[w]e can see no reason for a different view when the requirement is constitutional and a subsequent decision of the Court has made clear that the Court entering the decree interpreted the requirement too broadly." *Carey*, 706 F.2d at 971 (citing *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975)).

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9, 579 (1984), the Court, in considering a motion to modify a consent decree, again recognized and applied the principle that the remedies available to a court are limited and must be tailored to the federal law to be enforced. In that case, a requested modification was denied on the grounds that the

underlying statute, Title VII, did not permit the modification. The Court noted that Title VII acted as a limit on the district court's authority to modify the decree, prohibiting any modification that was inconsistent with the statute. 467 U.S. at 576, n.9.¹¹

In *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986), the Court held, in another Title VII case, that a consent decree containing a provision that a court could not have ordered after an adjudication on the merits, could be entered as an order and enforced by the court. The Court, however, specifically reserved the question of the limits of a federal court's authority to order more than what federal law requires when deciding a disputed request to modify a consent decree:

Because 706(g) [of Title VII] is not concerned with voluntary agreements by employers or unions to provide race-conscious relief, there is no inconsistency between it and a consent decree providing such relief, although *the court might be barred from ordering the same relief after a trial or, as in Stotts, in disputed proceedings to modify a decree entered upon consent.*

478 U.S. at 528 (emphasis added).

In this case, the District Court refused to consider changes in the law after the Consent Decree was entered and whether the Consent Decree as modified would provide for a jail that meets constitutional standards. Instead, the court dismissed the argument stating, "[e]ven if this were true [that double-bunking complies with constitutional standards], which it is not necessary to decide, it does not provide a basis for relief from a consent decree." (Sheriff's Cert. Pet. 12a.) The District Court's refusal to consider the Court's holding in *Bell v. Wol-*

¹¹ In his dissent in *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 539 (1986), Justice Rehnquist would have also applied this principle to the adoption and enforcement of consent decrees so that no consent decree could be adopted which contained provisions that go beyond the underlying federal law and could not be ordered by a court.

fish and whether if double-bunked the Nashua Street Jail would meet constitutional standards was clearly contrary to the Court's holdings in *Milliken v. Bradley*, *Board of Education of Oklahoma City v. Dowell*, *System Federation No. 91 v. Wright* and *Firefighters Local Union No. 1784 v. Stotts*.

B. Remedies Imposed By Federal Courts Should Preserve The Autonomy Of And Defer To The Judgment Of State And Local Governments.

Consistent with limitations on the scope of federal judicial power, principles of federalism also dictate that a remedy should preserve, to the extent possible, the autonomy of state and local governments and the exercise of independent professional judgment by state and local officials. In *Milliken v. Bradley*, 433 U.S. at 280-81, the Court held that in fashioning a remedy, a court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." In *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. at 637, this Court applied this principle to dissolve an injunction, thereby returning control of public schools to local officials.

Also, to the extent possible, in fashioning a remedy, a court should defer to and minimize interference with the exercise of independent professional judgment by state and local officials. This principle of judicial deference is derived from several interconnected concerns, including the separation of powers and practical concerns. The principle of separation of powers cautions against the assumption by the judiciary of functions properly charged to the legislative or executive branches. *Bell v. Wolfish*, 441 U.S. at 548 (citing *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)). Such deference is particularly appropriate in administering jails and prisons, which are complex institutions whose effective administration depends upon the judgments of experienced professionals. *Rhodes v. Chapman*, 452 U.S. at 351; *Bell v. Wolfish*, 441 U.S. at 548 (quoting

Pell v. Procunier, 417 U.S. 817, 827 (1974)); *see also*, *Youngberg v. Romeo*, 457 U.S. at 322-23 (applying this principle to permit state officials to select remedies to protect state mental patient's Fourteenth Amendment liberty interests).

Without this judicial deference the court becomes a policy-maker and administrator, exercising political functions reserved to the executive and legislative branches of our federal, state and local governments. *See Duran v. Elrod*, 760 F.2d at 759 (federal judges know little about the management of prisons; such judgments generally are the province of other branches of government than the judicial); *see also*, *Plyler v. Evatt*, 846 F.2d at 212 (federal courts have traditionally adopted a policy of judicial restraint in the problematic area of prison administration).

The Sheriff here must operate the Suffolk County Jail, a complex facility, as a part of an overall county and state correctional system that encompasses the state criminal justice system and the state's bail scheme. The District Court's opinion, however, is completely devoid of any consideration of preserving the autonomous functioning of these state and county institutions or of deference to the professional judgment of the Sheriff and others who administer the state's criminal justice system.

IV. THE CIRCUIT COURTS HAVE CONSISTENTLY RELIED ON CERTAIN FACTORS IN DECIDING WHETHER TO MODIFY A CONSENT DECREE.

The circuit courts have consistently held that a standard other than the stringent *Swift* standard should be applied to requests for modification of consent decrees in institutional reform litigation. In allowing requests to modify consent decrees, these courts have emphasized certain factors as justifying modification.

First, the courts have recognized the propriety of modification when there has been some change in circumstance, requiring a corresponding change in the prospective application of the decree. *Plyler v. Evatt*, 846 F.2d at 212 (in decrees governing prison administration, revision is necessary if the remedy is not working effectively or is burdensome); *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 965-67 (circumstances changed, preventing state defendants from finding sufficient small facilities to house all state patients); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1118 (changed circumstances prevented state defendant from complying with timetable set in decree); *Nelson v. Collins*, 659 F.2d at 427 (increase in prison population required modification to allow double-bunking). A further justification for allowing modifications is the difficulty of predicting and planning the operation of public institutions, *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120, and in particular, jail and prison capacity, *Nelson v. Collins*, 659 F.2d at 426.

Courts granting modifications because of changed circumstances also recognize that, when dealing with complex decrees and large public institutions, experience may present a better remedy.¹² *Heath v. DeCourcy*, 888 F.2d at 1108. In contrast to the *Swift* standard, the moving party under the flexible standard need not show that the changes justifying modification were "unforseeable." *Heath v. DeCourcy*, 888 F.2d at 1107 (defendant should have been aware at the time of agreement that jail population limits were not sufficient to hold population, but modification request granted).

¹² Indeed, some courts have adopted a "modern standard" that would allow modification of a consent decree solely because experience shows problems with its administration. *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (consent decree modified to allow for procedural change in staffing committee to oversee affirmative action compliance in public contracts); *Donovan v. Robbins*, 752 F.2d 1170, 1182 (7th Cir. 1985) (in approving a consent decree regarding administration of a union pension fund, court *in dicta* opined that decree can be modified if experience shows need).

Second, the courts have recognized that a change in the law relating to a consent decree favors modification. *Carey*, 706 F.2d at 971 (change in constitutional standard of amount of deference to allot to the judgment of professionals operating mental institutions); *Plyler v. Evatt*, 846 F.2d at 215, *Nelson v. Collins*, 659 F.2d at 424-25, *Newman v. Graddick*, 740 F.2d at 1521 (in all three cases, clarification of constitutional standards in *Rhodes v. Chapman* and *Bell v. Wolfish* justified modification of consent decrees to permit double-bunking); *Theriault v. Smith*, 523 F.2d 601, 602 (1st Cir. 1975) (Supreme Court decision construing underlying statute in a manner fundamentally different than parties' understanding at time consent decree entered justified vacation of consent decree).

Third, courts have balanced the interests of the parties, as well as that of the unrepresented public. *Heath v. DeCourcy*, 888 F.2d at 1110 (in determining whether modification furthers original purpose of decree, court must balance the interest of parties); *Plyler v. Evatt*, 846 F.2d at 214 (dangers in releasing prisoners early outweighed imposition on inmates of double-bunking); *Twelve John Does v. District of Columbia*, 861 F.2d 295, 299 (D.C. Cir. 1988) (courts must weigh the public interest in having lawful sentences carried out and in being protected from dangerous criminals); and *Duran v. Elrod*, 760 F.2d at 759 (court must consider public interest in approving, interpreting or modifying consent decree).

Fourth, the good faith of the defendant in attempting to comply with the decree has been held a relevant factor in considering whether to grant a modification, although the courts recognizing this as a factor have been inconsistent in determining what importance to place on it. *Plyler v. Evatt*, 846 F.2d at 215 (recognizing defendant's good faith in appropriating funds for and in beginning construction on new prisons before consent decree entered as a factor in affirming grant of modification); *Twelve John Does v. District of Columbia*, 861 F.2d at 300 (while expressing uncertainty whether a showing of "good faith" is by itself required, or whether it is merely a

factor to be considered in a balancing equation, modification was denied, *inter alia*, because of defendant's lack of good faith); *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 970 (defendant's good faith a factor in granting modification, even though court noted that defendant's hardship was self-imposed); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1121 (defendant's good faith recognized by court). *But see, Heath v. DeCourcy*, 888 F.2d 1105 (in which the court did not cite the defendant's good faith as playing any role in the decision to grant a modification). Conversely, in *Duran v. Elrod*, 760 F.2d at 762, the court described in detail the defendant's constant "foot-dragging" in complying with the consent decree, yet allowed the requested modification because of the overwhelming public interest that should not be penalized as a result of a defendant's intransigence.

Fifth, courts have considered whether the modification would be in derogation of the purpose of the decree. *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 969 (modification consistent with purpose of emptying mammoth state-run institution); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120 (modification would keep in force most of the provisions of the decree, and would not subject the class members to the "original evils" the decree was intended to eliminate); *Plyler v. Evatt*, 846 F.2d at 212 (as modified, a consent decree's "central goal" of providing constitutional prison conditions would still be achieved). In determining the purpose of a consent decree, these courts have not focused upon the consent decree's language, but upon whether the plaintiffs' rights would still be protected under the decree as modified.

In the present case the District Court did not include, in formulating and applying its "flexible" standard, any of the factors the circuits courts have emphasized when considering requests to modify consent decrees.

From these recurring factors and the other considerations set forth above, this Court can fashion a new flexible standard which can be applied to the facts of this case, as well as to future requests to modify consent decrees in institutional reform litigation.

V. THIS COURT SHOULD ADOPT A FLEXIBLE STANDARD WHICH INCORPORATES PRINCIPLES OF FEDERALISM AND TAKES INTO ACCOUNT THE UNIQUE FEATURES OF INSTITUTIONAL REFORM LITIGATION.

Unlike the courts below, this Court should, in accord with the holdings and reasoning set forth above, adopt a flexible standard which, *inter alia*: recognizes and accommodates the particular features of institutional reform litigation; accords with and incorporates principles of federalism and equity, which define and limit the power of a federal court to impose remedies upon state and local governments; considers changes in the law which clarify and further define the rights the court sits to enforce; and includes the factors which have been held to justify modifications of consent decrees.

The result in the present case and the reasoning of the courts below illustrate the need for this Court to decide what standard should be applied to requests to modify consent decrees in institutional reform litigation. A decision by this Court is needed because: (1) while a majority of the circuit courts have agreed on the need for a flexible standard, have focused upon certain factors as favoring modification and have employed similar reasoning, they have not agreed upon the elements of a standard; (2) in the absence of a decision from this Court, the factors focused upon and reasons employed by different courts will continue to vary, increasing confusion among courts and litigants, and new standards, as articulated in this case,

will emerge; and (3) institutional reform litigation will be of continuing importance, and public official defendants will remain in need of a standard that, while protecting the rights of persons under federal law, allows the flexibility to modify decrees when the need arises.

The proposed standard meets these needs, fully protects the rights and interests of consent decree beneficiaries, incorporates basic principles of federalism and equity and is supported by the decided cases as well as practical considerations of the efficient judicial administration of consent decrees. The standard the Sheriff proposes consists of two criteria, each of which must be met, if the modification is to be allowed:

- (1) Does the consent decree have a significant adverse effect on the public official defendant or on a particular public interest, which effect appears during the administration of the decree or arises from a change in circumstance?
- (2) Would allowance of the requested modification avoid the significant adverse effect, without derogating from the purpose of the consent decree, as defined by the constitutional, statutory or regulatory provision that occasioned the original intervention, as that provision may have been further defined or clarified by subsequent judicial decisions?

A. The First Criterion.

In considering requests to modify consent decrees, the cases and commentaries have focused upon certain features of institutional reform litigation as justifying a flexible standard and as favoring modifications. *See supra* at 15-18. Also, this Court has emphasized that remedies imposed upon state or local governments should, to the extent possible, preserve autonomy and leave public officials free to exercise their professional judgment. *See supra* at 26-27.

The first criterion incorporates these concerns by focusing upon the consent decree's effect on the public official defendant and the public interest. Specifically, to properly weigh these concerns, a court should consider: (1) the difficulty of complying with the decree, despite good faith efforts to do so, *see supra* at 29-30; (2) whether the decree has placed the public official defendant under competing or conflicting obligations, such that he or she cannot both comply with the decree and discharge those obligations, *see supra* at 28; (3) whether there has been excessive interference with the exercise of the independent judgment of the public official defendant, *see supra* at 26-27; (4) the extent of the interference with the autonomous functioning of state or local government institutions, *id.*; (5) the extent of the interference with state or local statutory or regulatory schemes, *id.*; and (6) the extent to which there have been unanticipated adverse fiscal consequences from implementation of the decree. *See* Brief of Amici Curiae for the State of Tennessee, Etc., in Support of Petitioners (discussing unanticipated adverse fiscal consequences of consent decrees in institutional reform litigation).

This criterion would not allow a modification of a consent decree merely because, after the fact, a defendant thinks better of it. Instead, it requires a showing that the modification requested is justified by some objective condition and not simply a defendant's change of heart. The different elements of the criterion function together to insure that the modification requested is justified both by the importance of the interest affected and by a change in the conditions which formed the context for the entry of the decree.

B. The Second Criterion.

The second criterion requires that a court evaluate a proposed modification to a consent decree by reference to the constitutional, statutory or regulatory provision that occasioned the original intervention and not by reference to the purpose of the consent decree as found in the language of the consent

decree or the "intention" of the parties. This formulation of the criterion is required by both fundamental principles of federalism and equity and practical considerations in the administration of consent decrees.

First, a court sitting to resolve a disputed request to modify a consent decree should apply the same principles in determining whether to grant the request as it does when considering an application for injunction. The application of the same principles is required because the court exercises its judicial authority whether it decides what relief to enter on an application for injunction or substitutes its decision on a disputed request to modify a consent decree for what had been the choice of the parties. These principles of federalism and equity require tailoring the remedy to what is needed to vindicate the right at issue, preserving, to the extent possible, the autonomy of state and local government and giving deference to the professional judgment of state and local officials. *See supra* at 23-27, 30; *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. at 637; *Milliken v. Bradley*, 433 U.S. at 280-81. A court can apply these principles only by looking to the underlying federal law to determine whether a proposed remedy is both sufficient to vindicate a given right and is tailored so as to meet these limitations on the court's authority.

If the purpose of the consent decree were found instead in the consent decree's language or in what the parties intended, remedies would be judged as sufficient not by the requirements of the law the court is sitting to enforce, but by reference to "rights" created by the parties. This would transform the court into what it is not: a recorder and enforcer of private agreements and a judicial body whose authority flows not from the law, but from what the parties define as the purpose of the decree that brings them before the court. *Local Number 93 v. City of Cleveland*, 478 U.S. at 537 (Rehnquist, J., dissenting) (citations omitted) (court's authority to adopt consent decree stems from underlying statute, not from parties' consent to decree).

In deciding whether the modification would derogate from the underlying constitutional or statutory purpose, a court should also consider changes or clarifications in that underlying law since entry of the consent decree. *System Federation No. 91 v. Wright*, 364 U.S. at 651; *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 971; *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975); See *supra* at 21-22. A court which does not consider changes in the law when deciding a disputed request to modify a consent decree will not be exercising its judicial authority to the fullest. The limitations on a federal court's power to impose remedies on a state or local government defendant can only be applied in the context of the law as it is when the court exercises its judicial authority.

Second, this criterion, by focusing upon the constant of the underlying law, rather than the varying language of consent decrees or differing judicial reconstructions of what was intended, will promote consistency between decisions of courts acting to vindicate the same federally-secured rights and between the decisions of different courts reviewing the same consent decree. See *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 969 (district court's finding that purpose of consent decree was to place plaintiffs to fifteen-bed homes was dramatically different from circuit court's finding that decree's purpose was to empty a mammoth institution). Also, as a practical matter, a court cannot divine a purpose from consent decree language or from sources other than the law which occasioned intervention in any principled manner, especially considering the long and complex history typical of institutional reform consent decrees, and the fact that the public official defendants, counsel, and even judges change over the course of the litigation.

Third, if requests to modify consent decrees were evaluated by reference to the purpose of the consent decree, as defined by the consent decree's language, and denied if that purpose were not fulfilled, plaintiffs could avoid any change in a con-

sent decree by stating as its purpose the preservation without alteration of its various provisions, despite changes in circumstance. *See Ruiz v. Lyndall*, 811 F.2d 856, 858, 862 (5th Cir. 1987). This would foreclose both as a practical matter, and contrary to the holding in *Swift*, the possibility of any substantive change in a consent decree requested by a defendant, remove the incentive for defendants to enter into decrees and allow the parties to restrict a court's equitable jurisdiction.

C. The Proposed Standard Preserves the Incentive to Enter Into Consent Decrees.

Consent decrees are frequently used devices to resolve complex and potentially costly litigation without a trial on the merits. Any standard proposed for evaluating a request to modify a consent decree should, to the extent compatible with other goals, preserve the usefulness of consent decrees as a means of dispute resolution.

The proposed standard does not remove this incentive. While federal rights require that some minimal constitutional threshold be met, they may be adequately vindicated by a wide range of remedies. Under the proposed standard the parties to a consent decree are free to choose from this range of remedies. *See, supra* at 16. Also, any remedy agreed upon may only be changed by a particularized showing, and, as shown below, plaintiffs are guaranteed full access to the courts when a consent decree has an adverse effect on them. Finally, of course, the incentive to enter into a consent decree to avoid court-imposed remedies that may leave a party dissatisfied, and to avoid the time, expense and publicity of trial, remain. *See* Brief of Amicus Curiae State of New York (discussing continued incentive to enter into consent decrees after adoption of a flexible standard).

D. The Proposed Standard Balances the Goals of Flexibility and Stability in the Administration of Consent Decrees.

The proposed standard balances the goals of flexibility and stability. See *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120 (an approach to modification that over-emphasizes finality at the expense of achievability would discourage settlement). Stability is provided because the decree may be modified only if a defendant shows both that the decree has an adverse effect and that the decree as modified will continue to vindicate the federally secured rights. In the absence of such a showing the decree is fully enforceable. Flexibility is provided because modification is allowed if the consent decree has an adverse effect on public institutions and/or public interests.

E. The Proposed Standard Appropriately Balances the Rights and Interests of the Parties.

Plaintiffs have always been able to seek modification of a consent decree when a remedy did not have the intended effect of vindicating a federally secured right. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968). Also, plaintiffs may seek modification where a change in the law results in an additional right accruing. *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). The proposed standard redresses the imbalance between these rights of plaintiffs and the rights of defendants under the *Swift* standard or the stringent standard applied in the present case, by permitting a defendant to obtain a change in a consent decree which is harming the defendant or the public interest.

VI. UNDER THE PROPOSED STANDARD THE MODIFICATION REQUESTED BY THE SHERIFF SHOULD BE GRANTED.

A. The Consent Decree has Adversely Affected the Sheriff, Other Public Institutions and the Public Interest.

The Sheriff's requested modification meets the first criterion. As set forth in the Affidavits of the District Attorney for Suffolk County, Newman Flanagan, and Commissioner of Police of Boston, Francis Roache (J.A. 114-17, 122-28.), an unprecedented explosion in arrests in Suffolk County beginning in 1988 caused a significant increase in the jail population the Sheriff must house. In February, 1989, the number of male inmates committed to the Sheriff's custody reached 508. (F.C.R.A. 379.) Since the opening of the Nashua Street Jail the number of male inmates committed to the Sheriff's custody has remained in excess of the 419 cells available. This change of circumstance has affected the Sheriff's ability to meet his competing obligations and has also adversely affected the public interest.

The Consent Decree requires the Sheriff to hold one inmate per cell at the Nashua Street Jail. Mass. Gen. L. Ann. ch. 268, § 20 obligates the Sheriff to hold, upon pain of criminal sanction, all the inmates committed to his custody. Each inmate committed to the Sheriff's custody by one of the district courts of or the Superior Court of Suffolk County is accompanied by a mittimus. Thus, when the number of inmates committed to the Sheriff's custody exceeds the number of cells at the Nashua Street Jail, the Sheriff cannot comply with the Consent Decree and meet the obligations imposed upon him by statute and the orders of the courts of Suffolk County.

As a means of complying with the Consent Decree, the Sheriff, under orders entered in the State Litigation, adopted by the District Court, has transferred Suffolk County inmates

to the state correctional system and to other county jails with the cooperation of the sheriffs of those counties. (J.A. 138.) Massachusetts has a comprehensive scheme of jails, houses of correction and prisons. Jails for pretrial detainees and houses of correction for persons serving misdemeanor sentences are operated in thirteen of the state's fourteen counties. Massachusetts also operates a state-wide system of prisons. The Consent Decree has interfered with the autonomous functioning of this scheme by requiring the transfer of inmates out of Suffolk County, where they would be held, but for the Consent Decree's single-celling provision, to state prisons and other county jails. This is contrary to the state's scheme for housing its pretrial detainees in the county where they were charged, which is most often their county of residence. It places a burden on those facilities, removes Suffolk County inmates from family, friends and counsel, often increases their length of stay, places them in facilities that are inferior to those of the Nashua Street Jail and imposes a transportation cost of almost a million dollars a year. (J.A. 214.)

After the Sheriff has made all the transfers he can and the number of inmates in his custody still exceeds the number of cells at the Nashua Street Jail, the Sheriff must submit a list of inmates' names to a judge of the Superior Court, who must choose which inmates' bail to reduce to release on recognizance so that the inmates may be transferred to an unsecure "halfway house" or be released directly to the street. (F.C.R.A. 397-98.) Experience has shown that ten to fifteen percent of these persons walk away from the halfway houses. (J.A. 141.)

Massachusetts also has a comprehensive bail statute, Mass. Gen. L. Ann. ch. 276, § 58, which presumes that an inmate should be released on recognizance. This presumption is overcome only if a judge determines, pursuant to particular criteria set forth in the statute, that such release is inappropriate. This initial bail is reviewed, if the inmate chooses, at the next business day sitting of the Superior Court. The single-celling requirement of the Consent Decree interferes with the function-

ing of the Massachusetts bail statute. The Sheriff can comply with the Consent Decree only when inmates are released on their own recognizance, contrary to the criteria of the statute and the adjudication of at least one (the district) and often two (the Superior) courts. This is a direct interference with the public interest in and legitimate governmental objectives of insuring the appearance at trial of all those charged with a crime and insuring the public safety.

The Consent Decree places the Sheriff under competing and conflicting obligations, interferes with the intended functioning of the county and state correctional systems and the state's bail statute and harms the public's interest in having those for whom the setting of bail has been judged necessary remain in custody until bail has been met.

These adverse effects have occurred where there can be no doubt of the Sheriff's good faith efforts to comply with the Consent Decree. The Sheriff fully implemented all of the orders contained in the original judgment regarding changes in the administration of the Charles Street Jail. It was the Sheriff who brought suit in state court in October, 1984, to compel the construction of a new Suffolk County Jail, when it became apparent that the City defendants, who alone had the authority to appropriate funds, were not following the construction schedule contained in the Consent Decree. The Sheriff also brought motions in the State Litigation to permanently expand the Bail Appeal Project, to increase the number of cells at the Charles Street Jail by having the City refurbish sixteen old cells and to obtain temporary use at the Charles Street Jail of sixty modular cells owned by the Commonwealth.

**B. The Limited Modification Requested Will Not Dero-
gate From The Decree's Purpose Of Providing A
Constitutional Jail.**

The complaint in this case alleged that Suffolk County pre-trial detainees were being held in conditions that violated the

Constitution. The purpose of the orders entered in this case and of the Consent Decree was to eliminate for Suffolk County pretrial detainees those unconstitutional conditions. The proposed modification to double-bunk 197 cells will not derogate from that purpose, because, even with these cells double-bunked, the jail will still provide constitutional conditions of confinement. None of the features of the new Nashua Street Jail will be altered under the Sheriff's double-bunking proposal. *See, supra* at 7-8.

In fact, the new Nashua Street Jail provides conditions that far exceed the constitutional minimum and, indeed, that exceed even the requirements of the Architectural Program. For example, the new jail has six outdoor recreation areas, while the Architectural Program requires only one. The new Nashua Street Jail also contains considerably more space than provided for in the Architectural Program. The Architectural Program required 309 cells and a total of 82,305 square feet or 266 square feet. The square footage, however, was increased to 151,840 square feet, a 54.2% increase, and the square feet per cell to 335 square feet. (F.C.R.A. 282, 365-72.)

After the Consent Decree was entered, this Court in *Bell v. Wolfish*, 441 U.S. at 535,¹¹ further defined a detainee's rights to constitutional conditions of confinement by clarifying that double-bunking is not *per se* unconstitutional:

In evaluating the constitutionality of conditions or restrictions of pre-trial detention that implicate only the protection against deprivation of liberty without

¹¹ *Bell v. Wolfish* was decided one week after the Consent Decree was entered. In their Brief in Opposition to the Sheriff's Petition for Certiorari respondents suggest that the Sheriff's failure to raise *Bell* in a motion to modify earlier forecloses this motion to modify. Respondents' Brief in Opposition at 22. Under the proposed flexible standard, and the standards applied by a majority of the circuits, the Sheriff had no cause for moving to modify until 1989, when administration of the Decree began having a significant adverse effect.

due process of law, we think that the proper inquiry is whether these conditions amount to punishment of the detainee.

The Court continued:

Thus, if a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not, without more amount to "punishment".

441 U.S. at 539. The Court then held:

On this record, we are convinced as a matter of law that "double-bunking" as practiced at the [Metropolitan Correctional Center in New York City] did not amount to punishment and did not therefore, violate respondent's right under the Due Process clause of the Fifth Amendment.

441 U.S. at 541.

Under this test, the modification the Sheriff requests would leave the inmates with a fully constitutional jail, and thus would not derogate from the purpose of the decree. The Sheriff made a clear showing that there was a legitimate public interest in double-bunking, since not doing so would require the Sheriff to put additional pressure on other state and county facilities, expend additional sums in transporting the detainees to distant counties, or prematurely release detainees who have already been denied release on two separate bail reviews. Double-bunking a portion of the new jail is a reasonable method of avoiding these adverse effects on the Sheriff, the inmates, other county and state facilities, the administration of the state's bail statute and the public interest in safety and in insuring the appearance at trial of all who are charged with a crime.

In considering the Sheriff's modification request, the District Court should have looked at the constitutional right the decree

was intended to vindicate — the provision of constitutional conditions of confinement. The District Court had no authority, when asked to assert its equitable jurisdiction, to hold that the Sheriff was required to continue to provide *more* than the Constitution requires. *See, supra* at 23-26.

In any event, the purpose of the Decree, as defined by the underlying constitutional provision, is identical to the purpose as stated in the Decree itself. The Consent Decree states as its only purpose that present and future members of the inmate class "will not be exposed to unconstitutional conditions of pretrial confinement." (Sheriff's Cert. Pet. 15a.) Consequently, the modification requested here should be granted whether this Court looks to the Consent Decree itself or looks to the underlying constitutional provision in defining the purpose of the Decree.

CONCLUSION

For all the reasons set forth above, the decisions below should be reversed and an order entered directing the allowance of the Sheriff's motion to modify the Consent Decree.

Respectfully submitted,

CHESTER A. JANIAK
Counsel of Record

THOMAS D. BURNS

PETER J. SCHNEIDER

ANN E. MERRYFIELD

WALTER M. FOSTER

BURNS & LEVINSON

125 Summer Street

Boston, Massachusetts 02110

(617) 345-3000

ROBERT C. RUFO

200 Nashua Street

Boston, Massachusetts 02114

(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County



...COUNTY JAIL, ET AL.

...ET AL.

...COUNTY JAIL, ET AL.

...in the United States
...in the First Circuit

...RECORDS

John E. Stone
Council of Record
Lynn Weinberg
David Shapiro, Rosefield
A. Weinberg
80 Southern Street, Suite 910
Boston, MA 02116
(617) 542-0663

QUESTIONS PRESENTED

1. Does a governmental official have the right to withdraw consent to a provision of a consent decree, at will, at any time, in order to litigate its merits, or must that official establish the existence of circumstances which render it no longer equitable to all parties to continue the decree in effect?

2. Did the district court abuse its discretion in concluding that, in light of all the circumstances of this case, it would not be inequitable to refuse to modify the essential element of the consent decree, by doubling the number of inmates that would be housed in most of the cells, thereby creating serious safety problems in cells that were specifically designed for single occupancy?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	19
ARGUMENT	22
I. THE DISTRICT COURT PROPERLY HELD THAT A PARTY SEEKING MODIFICATION OF A CONSENT DECREE MUST MAKE A SHOWING OF CIRCUMSTANCES DEMONSTRATING THAT "IT IS NO LONGER EQUITABLE THAT THE JUDGMENT SHOULD HAVE PROSPECTIVE APPLICATION," AS PROVIDED BY RULE 60(b)(5).	22
A. The Petitioners Are Not Entitled To Attack The Consent Order Entitled to On the Sole Ground That It Is Not Legally Required	22
B. Rule 60(b) Requires A Showing of Equitable Circumstances.	29
II. THE DISTRICT COURT PROPERLY DENIED MODIFICATION SINCE THE SHERIFF DID NOT ESTABLISH A MINIMUM SHOWING OF EQUITABLE CIRCUMSTANCES JUSTIFYING THE RELIEF SOUGHT	38
CONCLUSION	55

TABLE OF AUTHORITIES

Cases

Ackermann v. United States, 340 U.S. 193 (1950)	23
Airline Pilots Associate v. O'Neill, et al, 110 S. Ct. 1124 (1991)	40
Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986).	54
Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985)	12, 26, 43, 49
Badgley v. Santacroce, 853 F.2d 50 (2d Cir. 1988)	31, 35
Bell v. Wolfish, 441 U.S. 520 (1979)	11, passim
Board of Education v. Dowell, 111 S. Ct. 630 (1991)	33, 37
Browder v. Director, Department of Corrections, 434 U.S. 257 (1978)	23, 38
Commesso v. Commonwealth, 369 Mass. 368, 339 N.E.2d 917 (1975)	51
Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990)	38

Dace v. Solem., 858 F.2d 385 (8th Cir. 1988)	54
DeShaney v. Winnebago County DSS, 109 S. Ct. 998 (1989)	51
Delta Airlines v. August, 450 U.S. 346 (1981)	28
Estelle v. Gamble, 429 U.S. 97 (1976).	51
Evans v. Jeff D., 475 U.S. 717 (1986).	28
Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978)	25, 40
Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262 (1977).	27
Firefighters Local Union 1784 v. Stotts, 467 U.S. 561 (1984)	34
Hensley v. Eckerhart, 461 U.S. 424 (1983)	38
Hutto v. Finney, 437 U.S. 678 (1979) .	38, 51, 53
Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D.Mass. 1973)	2

Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974)419 U.S. 977 (1974) .	4,7,13
Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975)	13
Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98 (1st Cir. 1978) .	7, 8, 29
Inmates of the Suffolk County Jail v. Kearney, No. 89-1583 (1st Cir. November 13, 1989)	49
Inmates of the Suffolk County Jail v. Kearney, No. 90-1858 (1st Cir. Mar. 21, 1991)	14, 25
Jones v. City of Richmond, 106 F.R.D. 485 (E.D. Va. 1985)	36
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	52
Local 93, International Association of Firefighters v. Cleveland, 478 U.S. 501 (1986)	24, 25, 28, 30
Lubben v. Selective Service System, 453 F.2d 645 (1st Cir. 1972)	31

Marek v. Chesny, 473 U.S. 1 (1985) . .	28
Matter of Whitney Forbes, 770 F.2d 692 (7th Cir. 1985)	36
McCleskey v Zant, 111 S. Ct. 1454 (1991)	24
Milliken v. Bradley, 418 U.S. 717 (1974)	23
Missouri v. Jenkins, 110 S. Ct. 1651 (1990)	29
Morgan v. District of Columbia, 824 F.2d 1049 (D.C. Cir. 1987)	54
Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981)	34, 36
New York Mail & Newspaper Transportation Co. v. United States, 139 Ct. Cl. 751, 154 F. Supp. 271 cert. denied, 355 U.S. 904 (1957) . .	36
New York State Association for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983)	35, 36
Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984)	36

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)	41
Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d 1114 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980) . .	31, 34, 35, 36, 37
Plyler v. Evatt, 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988)	35
Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991)	36, 37
Revere v. Massachusetts General Hospital, 463 U.S. 241 (1983)	51
Riley v. Jeffes, 777 F.2d 143 (3d Cir. 1985)	54
Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987)	35
Schall v. Martin, 467 U.S. 253 (1984)	52
Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971) . . .	23
System Federation No. 91 v. Wright, 364 U.S. 642 (1961)	39
Twelve John Does v. District of Columbia, 861 F.2d 295 (D.C. Cir. 1988)	31

United States v. Armour & Co., 402 U.S. 673 (1971)	30
United States v. ITT Continental Baking, 420 U.S. 223 (1975)	30
United States v. Swift & Co., 286 U.S. 106 (1932)	17, 30, 32, 33
United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968)	34
Vosburg v. Solem, 845 F.2d 763 (8th Cir. 1988)	54
Withers v. Levine, 615 F.2d 158 (4th Cir. 1980) cert. denied, 449 U.S. 849 (1980)	54
Youngberg v. Romeo, 457 U.S. 307 (1982)	51
Statutes and Regulations	
Fed. R. Civ. P. 23(b)(2)	1
Fed. R. Civ. P. 60 (b)(5)	15, 20, 22, 29, 31, 35, 54
M.G.L. c.12, §3	27
M.G.L. c.34, §3	2, 26
M.G.L. c. 34, §14	26

M.G.L. c.124, §1	2
M.G.L. c.126, §16	26
M.G.L. c. 127, §16	2
M.G.L. c.127, §§1A, 1B	2
M.G.L. c.276 §52A	13, 51
1985 Mass. Acts c.799	48
1986 Mass. Acts c.658	48, 49
103 C.M.R. §972.03 (2)	46
105 C.M.R. §§450.321	46, 53
Other Authorities	
Chayes, <u>The Role of the Judge in Public Law Litigation</u> , 89 Harv. L. Rev. 1281, 1299 (1979)	28
Jost, <u>From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts</u> , 64 Tex. L. Rev. 1101, 1124, 1162 (1986)	31, 32, 33, 34, 35, 39, 40
McConnell, <u>Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change</u> , Chi. L. Forum 295 (1987) .	36
Moore's <u>Federal Practice</u>	35

Note, <u>The Modification of Consent Decrees in Institutional Reform Litigation</u> , 99 Harv. L. Rev. 1020, 1037 (1986)	35
Wright and Miller, <u>Federal Practice and Procedure</u>	36



STATEMENT OF THE CASE

The ultimate issue on this petition is whether the district court properly refused to modify the single cell requirement that had been agreed upon ten years earlier and that had been the basis for all the efforts of the parties in the interim. The briefs of the petitioners give short shrift to the history of this case, and instead they focus their attention on the legal arguments regarding the proper standard under which consent decrees may be modified. Because of that omission, respondents have set forth this history in considerable detail in order to demonstrate that, while in some cases the standard for modification will be vital, the facts and equities are so clear in this instance that the decision to deny modification, which the district court made under more than one standard, should be affirmed.

A. Proceedings Leading to the Consent Decree

This lawsuit was commenced in 1971 on behalf of the class of inmates of the Suffolk County Jail,^{1/} a county facility for pre-trial detainees then known as the "Charles Street Jail." The class was certified under Fed. R. Civ. P. 23(b)(2) on June 29, 1971, consisting of "the inmates of the Suffolk County Jail." (C.A. App. 9).^{2/} Defendants

^{1/} The named plaintiffs were Paul P. McLorin, Stephen Gordon, Julio Gonzalez, Carlos Manuel Lopez, Rogelio Santiago and Luis Lopez Perez.

^{2/} References are as follows: Joint Appendix: J.A.; Sheriff's Petition for Writ of Certiorari: Sher. Pet.; Appendix for First Circuit Court of Appeals: C.A. App.; Sheriff Rufo's Brief: Sher. Brf.; Commission of Correction Rapone's Brief: Comm. Brf.; Brief for the United States as Amicus Curiae: U.S. Brf.

were the Sheriff of Suffolk County, who operates the jail, M.G.L. c. 127, §16, the Mayor and City Councilors of the City of Boston, who constitute the Suffolk County Commissioners and who have the duty to provide a "suitable jail," M.G.L. c.34, §3, and the Massachusetts Commissioner of Correction, who operates correctional institutions and who sets standards for county facilities. M.G.L. c.124, §1; M.G.L. c.127, §§1A, 1B.

The plaintiffs alleged that the conditions of confinement violated both the Eighth and Fourteenth Amendments to the Constitution. In 1972, the parties submitted two stipulated partial judgments which were entered by the court and which "narrowed the issues to be resolved" at trial. (Sher. Pet. 24a, 50a-54a). The trial consisted primarily of testimony from experts, and the district judge and his law clerk took a view of the entire facility and "without advance notice, stayed overnight in a cell." *Id.*

In its initial Opinion and Order of June 23, 1973, the district court held that the conditions at the Suffolk County Jail violated the detainees' rights to due process of law under the Fourteenth Amendment to the United States Constitution. Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D.Mass. 1973). (Sher. Pet. 23a). The court reviewed the unhealthy, inhumane and dangerous conditions of confinement of men and women who had been accused of a crime, but not convicted, Sher. Pet. 25a-35a, and concluded that the sole effective remedy was to replace the antiquated jail. (Sher. Pet. 45a). The court found that one of the worst aspects of confinement was the then-prevailing practice of double-celling:

Cell size is approximately 8' wide x 11'

long x 10' high, and was designed and constructed for single occupancy. . . . It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions.

. . .
On July 12, 1972 an inmate was beaten to death by his cellmate, who had beaten a previous cellmate in May 1971. Despite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy of cells

Sher. Pet. 26a-27a, 27a, n.4. The court concluded that this practice violated the constitutional rights of the pre-trial detainees at the jail:

Briefly, an inmate at Charles Street who merely stands accused spends from two months to six months or longer awaiting trial. Each day he spends between 19 and 20 hours in a cell with another, strange, and perhaps vicious man. When both inmates are in the cell, there is no room effectively to do anything else but sit or lie on one's cot. The presence of a cell-mate eliminates any hope of privacy; an inmate may not use the toilet except in the presence of a stranger mere feet away.

(Sher. Pet. 42a). Accordingly, as the first element of the interim relief, the court permanently enjoined the

defendants "from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial." (Sher. Pet. 48a). The court also enjoined the defendants from holding any detainees at the jail after June 30, 1976. (Sher. Pet. 48a). No appeal was taken.^{2/}

By 1977 virtually no progress had been made on producing a plan for a replacement facility. After prodigious, but fruitless, efforts by a Special Master, Judge Garrity set a firm date for the closing of the jail, and he ordered the expenditure of funds to acquire and renovate existing facilities in Suffolk and Middlesex Counties. (J.A. 22, 34).

All parties appealed; the defendants because they objected to the intrusiveness of the remedy, the plaintiffs because they were dissatisfied with conditions in the proposed renovated facilities. Pending appeal, the First Circuit stayed implementation of the acquisition and renovation remedies, but it refused to stay the order closing the jail:

We see no reason to issue a stay of the second order. Certainly as far as pre-trial detainees are concerned, the substantive issues of this case have been resolved long

^{2/} The First Circuit later held that the failure to appeal foreclosed the defendants from contesting the court's rulings at a later point. See Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1199-1200 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974).

ago. In that case it was decided that incarcerating pre-trial detainees at the Charles Street Jail violated the constitutional rights of the detainees and that such incarceration should be halted by June 30, 1976.

It is now September, 1977. The district court's order does not go into effect until November 1. Not only have defendants failed to present any evidence that they will suffer irreparable harm pending appeal but on any reasonable balance of the equities involved, it is the plaintiff class whose interests have been kept in legal limbo while the court has attempted to accommodate constitutional requirements with the practical considerations preventing immediate redress. That class cannot be denied its rights interminably.

Memorandum and Order (1st Cir. September 2, 1977)
(citations omitted) (J.A. 35-36).

When the merits of the appeal were reached, plaintiffs renewed the effort to obtain agreement on a new facility. Specifically, counsel for the plaintiffs advised the court that, in spite of the unconscionable delay to date in the vindication of plaintiffs' rights, plaintiffs were prepared to agree to a further delay -- in particular, to delay the release of members of the plaintiff class from the Charles Street Jail -- in return for an enforceable commitment by the defendants to adopt and execute a plan providing for the provision of a new facility, within a reasonable period

of time and according to specific criteria. Shortly after oral argument, the court of appeals acted upon this suggestion in a Memorandum and Order which provided, inter alia, as follows:

During argument, counsel for the Boston City Council, counsel for the Mayor, and counsel for the plaintiffs, all indicated their basic agreement as to the ultimate goal of constructing constitutionally adequate jail facilities. It was stated that within a period of two months, it might well be possible to secure basic agreement of an acceptable plan of action ensuring the prompt construction of such needed facilities.

. . . .
[W]e believe it appropriate . . . to request the parties to meet forthwith, while the appeals remain under submission, and see whether they can agree upon the main ingredients of a plan of action for the construction of adequate jail facilities. These would include an acceptance of both interim and long range goals as to the conditions of confinement within the projected facilities, settlement of a site and target dates for implementation of the plan, and, most important, a good faith commitment to make sufficient funds available when final detailed plans have been approved.

Memorandum and Order (1st Cir. December 15, 1977) (emphasis added) (J.A. 44-47). The court thus stayed the

jail closing order to March 3, 1978 to permit the parties to submit a "constitutionally adequate" plan. Id.

Although the parties began negotiating, by March of 1978 "[n]o agreement was reached." Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99 (1st Cir. 1978). The First Circuit therefore affirmed the district court's order closing the jail and observed:

It is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under the conditions repugnant to the constitution.

Id. However, the court decided to give the defendants one final chance to submit "a plan for a new facility including commitments for adequate funding, agreement on a site, projected target dates for the beginning and completion of construction, and an architectural design or written description of the conditions of confinement within the new facility consistent with constitutional standards." Id. at 101. If no such plan was approved prior to October 2, 1978, the jail was to close on that date. Id. at 100-101. No review was sought in this Court.

Faced with an immovable closing date, the defendants finally filed a plan on September 28, 1978, which became the basis for the consent decree that is now before this Court. Plaintiffs supported the plan, and it was approved by the district court on October 2, 1978. As a result, the old jail was permitted to remain in use until completion of the new facility. In approving the plan, the district court emphasized that it provided for single cell occupancy in the

new facility:

the critical features of confinement, such as single cells of 80 sq. ft. for inmates are fixed, and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions are included.

Memorandum and Orders as to Pretrial Detention, October 2, 1978, (emphasis added) (J.A. 55). The order recognized that a final, more detailed architectural program would be prepared, but noted that "there are unequivocal commitments to conditions of confinement which will meet constitutional standards." *Id.* (emphasis added) The court ordered the defendants not to deviate from the plan "in any substantial way" without court approval and "without delay [to] take all steps to carry [it] out." (J.A. 58).

B. The Consent Decree

Thereafter, the city defendants submitted a revised and expanded version of the September 27, 1978 plan. The district court referred the matter to a Special Master who, in a series of meetings held in the early months of 1979, assisted the parties in reaching a series of interrelated compromises which came to be embodied in the consent decree. An architectural program was negotiated which established the standards for the new jail. The program was consistent with the previously approved plan, and it provided for single occupancy cells for both male and female detainees.

The Consent Decree was approved on May 7, 1979. It

attached and incorporated the architectural program by reference, with its requirement of single cell occupancy. (J.A. 73, 85-86). Specifically, the decree required the defendants to "construct, maintain and operate" a new detention facility "according to the standards contained in . . . Architectural Program." (Sher. Pet. 16a). In its preamble, the decree noted the desire of all parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design" and that the attached and incorporated Architectural Program "sets forth a program which is both constitutionally adequate and constitutionally required." (Sher. Pet. 16a). The preamble also included the recognition by the parties of the mutual trade-offs involved: the defendants would be allowed to use the existing facility until a new one was constructed; the plaintiffs would obtain specific minimum criteria for conditions of confinement of future members of the class. (Sher. Pet. 15a-16a). The decree further provided that defendants could not "change or depart" from [the architectural program] in any substantial way except with the assent of the parties or the approval of the Court." (Sher. Pet. 21a). The new jail was to be completed by 1983.

Shortly after the decree was approved, the case was reassigned to Judge Keeton. The design phase then began. In that process, single occupancy became the basic assumption for the entire plan. In particular, the architects relied on the single occupancy feature to assure both safety and privacy by creating individual rooms not subject to surveillance. As ultimately constructed, under this plan, the regular housing cells are designed in modular units. (J.A. 136). Each unit contains two tiers of cells with an

adjacent dayroom, showers, visiting rooms, quiet rooms, and recreational facilities. (J.A. 136). The cells are 70 square feet, with approximately 40 square feet of available floor space. (J.A. 76, 185). The cells have doors, not bars, with a narrow window. (J.A. App. 265). The window provides a wide field of vision from the outside only if the observer is immediately adjacent to the door. Each cell has a toilet and sink unit which is placed near the door at an angle so that the detainee cannot be observed while using the toilet. (J.A. 171). From the control room, where officers are stationed, it is possible to maintain observation only of the dayroom area outside the cells, but not the inside of the cells. (J.A. 170-72, 261).^{4/}

C. Subsequent Proceedings Relevant to the Consent Decree

The detainee population increased steadily after entry of the decree.^{5/} (Sher. Pet. 10a.) The initial planned

^{4/} Diagrams clearly depicting the viewing limits are included in the record at J.A. 261-64.

^{5/} The actual number of male detainees committed to the Sheriff since the Consent Decree has been:

<u>Year</u>	<u>Population</u>	<u>Year</u>	<u>Population</u>
1980	190	1986	321
1981	227	1987	370
1982	281	1988	413
1983	300	1989	408
1984	320	1990	
1985	326	(through February)	371

capacity of the new jail was 309. However, in November, 1982, the Sheriff notified the parties that a larger facility would be required. (C.A. App. 642).

By 1984, plans were completed for the new 309 single occupancy cell jail, but construction had not started and sufficient funding had not been appropriated by the City defendants. On March 9, 1984, counsel for the Sheriff informed the Director of the Public Facilities Department of the City of Boston that the Sheriff would not sign off on the working drawings because a 309 cell jail "would not be adequate to house current or future Suffolk County's pre-trial population." (C.A. App. 644).

On June 8, 1984, the Sheriff moved the district court for an order to permit double cell occupancy in the south wing of the Charles Street Jail. At a hearing on August 6, 1984, the Sheriff argued that, under Bell v. Wolfish, 441 U.S. 520 (1979), he should be allowed to double bunk detainees, since there was an overcrowding problem. The court denied the Sheriff's motion, finding that there were not sufficient grounds to warrant any modification of the single cell occupancy injunction. (C.A. App. 61).

In October of 1984, litigation was commenced before a Single Justice of the Massachusetts Supreme Judicial Court which came to focus on the adequacy of the planned capacity of the new jail. The plaintiffs were intervenors in this action. The Sheriff argued that the planned capacity of 309 was insufficient and proposed, based on state law, that the various state, city and county defendants be ordered to provide a jail with 435 cells to house a detainee

(C.A. App. 649, 651, 38; J.A. 243).

population of that number. The Single Justice ordered that the larger jail be built, and this order was affirmed by the full bench, which held that under state law, the Mayor and City Council of the City of Boston have the duty to provide a jail of suitable size to accommodate the detainees in conformity with the requirements of the federal consent decree. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E. 2d 361 (1985).

Thereafter, on April 11, 1985, the district court modified the decree to permit the defendants to increase the capacity of the jail by any amount. (J.A. 110). The order was entered with the assent of both the Sheriff and the Commissioner.^{6/} (J.A. 133). The order provided that "[n]othing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity of the new facility if . . . single occupancy is maintained under the design for the facility." (emphasis added) (J.A. 110-111). The order also required that "the relative proportion of cell space to support services will remain the same as it was in the Architectural Program." (J.A. 111). These portions of the order were drawn from the nearly identical language proposed by the Sheriff and the plaintiffs (J.A. 104-09). The order also provided that any modification of the schedule for design and construction ordered by a state court would automatically amend the schedule authorized under the federal order, unless any party objected. (J.A. 112). Thereafter, the state legislature approved funding for the construction of the new jail. St. 1985, c.799. (C.A. App. 335).

^{6/} The City councilors objected (on grounds not pertinent here), but did not prosecute an appeal. (J.A. 110, C.A. App. 64).

Following the district court's order of April 1985, the jail population continued to increase.^{2/} Despite the increase in commitments, the Sheriff was always able to comply with the single cell injunction which, at the Charles Street Jail, entailed a population limit of 342.^{8/} This was accomplished through a number of measures, including the transfer to state prisons of pre-trial detainees who had previously served felony sentences in state correctional institutions,^{9/} Superior Court bail reviews conducted by the Bail Appeal Project,^{10/} and special Superior Court sessions pursuant to an order of the Supreme Judicial Court. This order provided for comparison and review of bail orders on a county-wide basis, and authorized the selection of suitable detainees for transfer to a halfway house or release on personal recognizance. (C.A. App. 389).

^{2/} By 1985, the population already exceeded the number of cells then planned for regular male housing in the new jail. See J.A. 134, 243.

^{8/} In 1987, with the consent of all parties, the Sheriff installed sixty modular cells. In 1988, the Sheriff moved for permission to double cell in these units. The court denied the motion, (C.A. App. 595), and the decision was affirmed on appeal. Inmates of the Suffolk County Jail v. Kearney, No. 89-1585 (1st Cir. November 13, 1989) (per curiam).

^{9/} These transfers are made pursuant to M.G.L. c.276 §52A. Inmates of the Suffolk County Jail v. Eisenstadt, 494 F.2d 1196, 1198 (1st Cir. 1974), cert. denied sub. nom. Hall v. Inmates of the Suffolk County Jail, 419 U.S. 977 (1974).

^{10/} Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241 (1st Cir. 1975).

During this period, the Sheriff made no motion to modify the decree. No party suggested that a new design should be considered. Instead, planning continued under the single occupancy model, and ultimately, the facility was constructed on that design. According to the Sheriff's January, 1990 affidavit, he "chose" the "certainty of a new facility" and decided not to seek a change in its design to accommodate a larger population because, in his view, that would have involved "further delay and additional expense to the public." (J.A. 209)

Ground breaking for the new Suffolk County Jail on Nashua Street in Boston took place in September of 1987. The foundation was completed by the Spring of 1988, and construction was completed in the Spring of 1990. The detainees were moved to the jail in late May, 1990. The total male planned capacity at the new jail was 413, an increase of 71 cells over the male capacity at the Charles Street Jail. (J.A. 242, 244-45).^{11/}

^{11/} The total capacity was 453, with 40 cells allocated for women. Since the opening of the new jail, on account of developments in this lawsuit, the male capacity increased to 419. The district court entered an order which permitted the use of a smaller modular unit for female detainees, rather than the 40 cell modular unit originally allocated to them. As a result, the Sheriff decided to use a 34 cell modular for the women, thus increasing the male capacity by six. See Inmates of the Suffolk County Jail v. Kearney, No. 90-1858 (1st Cir. Mar. 21, 1991).

D. The Sheriff's 1989 Motion to Modify the Consent Decree

On July 17, 1989, when the construction of the jail was nearing completion and it was no longer possible to change the design of the building, the Sheriff moved the district court for modification of the consent decree pursuant to Fed.R.Civ.P. 60 (b)(5) or (6) to allow the double bunking of male detainees in 197 of the jail's 316 regular male housing cells. Under the Sheriff's original proposal, the maximum male capacity would be 610; with 64% of the male population being double bunked.

In the district court, the Sheriff argued that there were certain changes in the law and the facts which required modification. (J.A. 246-48). The changed circumstances cited by the Sheriff were (1) an asserted change in the law, effected by the decision in Bell v. Wolfish, 441 U.S. 520 (1979), which was decided one week after the consent decree was approved by the district court, and which the Sheriff had previously, but unsuccessfully, relied upon to seek an earlier modification of the decree, and (2) an asserted change in operative fact, to wit, increases in the Suffolk County pre-trial detainee population. The Sheriff proposed adding a second, bunk-style bed on top of the existing bed, even though the cells were specifically designed for single occupancy. Those detainees who would be double bunked would be out of their cells for 12 hours per day and locked in their cells for 12 hours per day.^{12/} (J.A. 141-43). The Commissioner of Correction

^{12/} In 1989 at the time of the Sheriff's motion for modification, 32% of the population of the jail had been held for more than 60 days and 15% of the population had been held for more than

took no position on the Sheriff's motion -- filing no papers and making no oral argument. (Transcript of Hearing, March 30, 1990).

In their opposition, plaintiffs introduced evidence demonstrating that because the cells were specially designed to maximize privacy for a single occupant, double bunking would present a serious risk to the personal safety of the detainees. Multiple occupancy would inevitably increase tensions and increase the likelihood of violent behavior between detainees. (J.A. 183-89; C.A. App. 881-84). According to the undisputed evidence, it would be extremely difficult to observe or hear altercations between two detainees in a cell because of the layout and design of the cells, the design of the cell door, and the location of the guard's control room. (J.A. 169-73, 260-64). Plaintiffs also submitted an architectural analysis which demonstrated that increasing the capacity by adding 197 detainees would make it impossible to comply with the district court's order to maintain "the relative proportion of cell space to support services" as specified by the architectural program. (J.A. 111, 151-69; C.A. App. 851-55).

In response, the Sheriff contended that the risk of harm to the detainees could be reduced by a classification system for selecting detainees "suitable" for double bunking. (J.A. 143). But in the views of plaintiffs' experts, a classification plan could not materially affect the risk, particularly since in a pre-trial setting little background information is available and since, under the Sheriff's proposal, 64% of the population would be double bunked.

120 days. (C.A. App. 653; Sher. Pet. 10a).

(J.A. 187-89). The Sheriff's expert conceded that "at present there is no fully reliable way of predicting an inmate's behavior toward his fellow inmates." (C.A. App. 704). His conclusion, however, was "that double bunking at the Nashua Street Jail will not pose a significantly increased risk of violent or assaultive behavior between cellmates." (emphasis added) (C.A. App. 706).

Plaintiffs' architectural expert also addressed the question of when the design of the jail could have been changed to accommodate a larger capacity. The uncontradicted evidence was that changes could have been made at any point prior to April 1988, when the foundation was completed. (J.A. 174-76). The architect also analyzed whether there was any way to expand the capacity of the jail at the Nashua Street site without double occupancy. He concluded that as many as 48 modular cells could be installed in the rear yard without interfering with the jail's fire safety and emergency evacuation plan and would necessitate only the relocation of sixteen staff parking spaces. (J.A. 236, 266-69).

The district court took a view of the Nashua Street Jail on March 9, 1990 and made a close inspection of the entire facility. (C.A. App. 69). After a hearing, the district court denied the Sheriff's motion for modification of the decree. (Sher. Pet. 13a). The court found it unnecessary to decide whether double celling in the new facility would be unconstitutional, (Sher. Pet. 12a), since it concluded that modification was not warranted in any event.

First, the court considered whether the Sheriff had met the test for modification set forth in United States v. Swift

& Co., 286 U.S. 106, 119 (1932). Applying this standard, the court found no basis for relief since neither the factual nor legal changed conditions advanced by the Sheriff were new or unforeseen. The court found that Bell v. Wolfish "did not directly overrule any legal interpretation on which the 1979 consent decree was based." (Sher. Pet. 10a). Rather, the court held, the consent decree constituted "an agreement by all parties to avoid the risks of litigation involved in pressing for a judicial determination on the issue of constitutionality." (Sher. Pet. 13a). The court found that the increase in detainee commitments "has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." (Sher. Pet. 10a).

Second, the court noted that "this motion was not filed until July 1989" even though "there has been a marked upward trend in the number of inmates held in the Sheriff's custody since 1985." (Sher. Pet. 11a).

Next, the court considered whether the Sheriff had presented sufficient grounds for modification under the "flexible" standard advocated by him. Applying this standard, the court still concluded that "modification would not be appropriate." (Sher. Pet. 12a). Specifically the court found that:

[t]he proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards. A separate cell for each detainee has always been an important element of the relief sought in this

litigation -- perhaps even the most important element. Plaintiffs have been willing on more than one occasion to make concessions and accept delays in order eventually to obtain the elements of relief they considered essential. The type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree. (Sher. Pet. 12a).

The Sheriff and the Commissioner of Correction appealed. The First Circuit, in a *per curiam* opinion, affirmed, stating "we are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." (Sher. Pet. 2a).

SUMMARY OF THE ARGUMENT

The argument of petitioner Commissioner of Correction that a governmental defendant has the perpetual right to withdraw consent to a decree in order to litigate its validity, at will, is without any legal support and is contrary to basic principles of finality. If the right were recognized, it would effectively eliminate the consent decree as a viable method of resolving litigation with governmental entities. No rational party would ever agree to a decree which the other party is free to disavow at any time. Ironically, by mandating adversary adjudication, the petitioner's formulation would increase federal judicial involvement in the affairs of states and localities, precisely the kind of incursion on federalism that petitioner professes to oppose.

Therefore, the district court correctly held that a governmental official seeking to modify a consent decree to avoid an obligation must make a showing, under Fed. R. Civ. P. 60(b)(5), of circumstances which render it "no longer equitable that the judgment should have prospective application." Such a standard must provide assurance to negotiating parties that consent decrees will not be nullified absent truly exceptional circumstances. Thus, a moving party must establish, at the least, that (1) the "new" circumstance was not foreseen and not reasonably foreseeable, since the court must determine whether application of the decree in current circumstances actually was part of the original bargain; (2) the motion is timely (that is, made when the need first becomes apparent) and consistent with a good faith effort to comply with decree obligations; (3) the proposed modification is equitable to the decree beneficiary, considering the intended benefits of the basic bargain and the concessions made and already carried out; (4) the modification is necessitated by substantial governmental interests and is the least drastic alteration of the decree needed; and (5) modification is not likely to lead to another violation of law.

The district court's refusal to modify this decree should be affirmed because it correctly determined that petitioner Sheriff had not made a minimum showing. There is surely no abuse of discretion, which is the governing standard of review. The only factual change relied on by petitioners is an increase in the jail population, but that was foreseen long before the Sheriff ever sought this modification, at a time when changes in the design in the jail could have obviated the problems that petitioners now claim as their justification and eliminated the resultant harm to the plaintiff class.

Nor was there any change in the law. The case relied on by petitioners, Bell v. Wolfish, 441 U.S. 520 (1979), was sub judice in this Court while the decree was being negotiated, was decided just days after the decree was entered, and ten years before the Sheriff made his most recent motion to modify. Furthermore, that decision by no means dictates the relief he seeks since it specifically recognizes the fact-bound nature of every inquiry dealing with the legality of conditions of detention.

Modification would also be extremely inequitable to the plaintiff class who waited for more than ten years for a new jail, enduring unacceptable interim conditions in exchange for long-term benefits. Now that plaintiffs have carried out their part of the bargain, defendants seek to drastically modify theirs by eliminating the single most important element of the decree -- single celling. Indeed, given the unique design of the new jail, double celling in smaller units, with no ability of jail officials to monitor cells to assure safety, without a modicum of privacy in cramped conditions for 12 hours a day, inmates would, in crucial respects, be worse off in the new jail than in the old one, which everyone agreed had to be torn down. Petitioners have thus also failed to show that modification of the decree will not lead to an unreasonable threat to the personal security of the detainees and thus violate their rights to due process of law.

The judgment should be affirmed. Alternatively, the Court should remand for further consideration by the district court in light of current circumstances, including changes since the hearing on the motion in March, 1990.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT A PARTY SEEKING MODIFICATION OF A CONSENT DECREE MUST MAKE A SHOWING OF CIRCUMSTANCES DEMONSTRATING THAT "IT IS NO LONGER EQUITABLE THAT THE JUDGMENT SHOULD HAVE PROSPECTIVE APPLICATION," AS PROVIDED BY RULE 60(b)(5).

A. The Petitioners Are Not Entitled To Attack The Consent Order Entitled to On the Sole Ground That It Is Not Legally Required.

The district court ruled that a county government official seeking modification of a consent decree is not entitled to be excused from a previously agreed-upon obligation solely on the ground that the order to which he consented is not actually compelled by the Constitution. (Sher. Pet. 12a-13a). Rather, Judge Keeton held that, consistent with the plain language of Fed. R. Civ. P. 60(b)(5)(3d clause), the moving party must also establish that "it is no longer equitable that the judgment should have prospective application."

In this Court, petitioner Commissioner of Correction contends that this rule does not apply when "governmental defendants have withdrawn their consent." (Comm. Brf. at 44). According to his theory, a governmental defendant has the unfettered and permanent right to withdraw its consent to any provision of a consent decree in order then to litigate whether the remedy is now independently

required by the Constitution. In the Commissioner's view, the right of a government official to collaterally attack a consent decree may be exercised at any time and without any showing of equitable circumstances whatsoever. In this case, the Commissioner withdrew his consent only on appeal, after Judge Keeton had already denied modification.

The Commissioner argues first that no order which is not affirmatively required by federal law can be enforced by a federal court. He contends that the single cell occupancy order is not required by the Constitution. Therefore, he argues, the refusal of the district court to relieve the Sheriff of the obligation exceeds the scope of federal judicial power. See Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1 (1971); Milliken v. Bradley, 418 U.S. 717, 744 (1974).

The district court did not reach the constitutional issue,^{13/} and the parties disagree as to it.^{14/} However, even assuming that the order is not constitutionally required, the Commissioner's argument is flawed because it overlooks the most fundamental principles of finality in litigation. This Court has held that a final judgment is not open to review on the merits other than by way of direct appeal. Otherwise there would be no end to litigation. Ackermann v. United States, 340 U.S. 193, 198 (1950); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 271 (1978). The interest in finality is so strong that it even applies to judgments upholding sentences of

^{13/} Sher. Pet. 12a.

^{14/} See Section 5 at p. 49, infra; C.A. App. 557-58.

death. McCleskey v Zant, 111 S.Ct. 1454, 1469 (1991).

Petitioner contends, however, that the order here should not be treated with similar final effect since it was not the result of an adjudication but was entered by consent. The argument is that since the parties to a lawsuit cannot agree to create or extend the limited jurisdiction of a federal court, they likewise cannot contract with each other to create power to enter an order which otherwise would not exist. However, this issue was resolved in Local 93, Int'l. Ass'n. of Firefighters v. Cleveland, 478 U.S. 501 (1986). In that case the Court upheld the entry of a consent decree providing for injunctive relief against municipal officials, over the objection of an intervenor, even though the decree "provide[d] broader relief than the court could have awarded after a trial." Id. at 525. Under Local 93 a consent decree may be approved if it (1) "spring[s] from and resolves a dispute with the court's subject matter jurisdiction; (2) "'come[s] within the general scope of the case made by the pleadings;'" (3) "further[s] the objectives of the law on which the complaint was based"; and (4) is not actually prohibited by federal law. Id. The consent decree in this case meets all of these criteria. Indeed, the case for upholding the decree here is even stronger. In Local 93 the parties and the district court knew in advance that the relief consented to was otherwise beyond the power of the court to grant after trial because it was specifically prohibited by statute. Here, by contrast, the issue of whether pre-trial detainees were legally entitled to single occupancy, as a matter of constitutional law, was

very much in dispute when the decree was negotiated.^{15/} Nor did Bell v. Wolfish, 441 U.S. 520 (1979), decided after the entry of the decree, hold that the relief was prohibited. It held only that single occupancy was not constitutionally compelled on the facts of that case, as the United States properly recognizes in its brief. (U.S. Brf. at 20, n.9).

Alternatively, the Commissioner argues that even if a federal court may sometimes enforce a consent decree that goes beyond what is legally required, this Court should recognize a special right of a governmental official to withdraw consent. Local 93, he claims, did not dispose of the question since it dealt only with entry of the decree and not modification. (Comm. Brf. at 43-44). Accordingly, he argues, even if the decree might have been valid when entered, it became invalid as soon as consent was withdrawn. The Commissioner argues that this right is compelled by principles of federalism since, otherwise, consent decrees would permit public officials permanently to bind successors and other branches of government, even though these officials could not otherwise do so under state law. This, it is said, would interfere with the state democratic process.

There is no merit to this argument, for several reasons. First, consent decrees bind successors and non-parties to no greater extent than do adjudicated decrees, as to which

^{15/} The state of the law in the First Circuit in 1979 was set forth in Feeley v. Sampson, 570 F.2d 364, 370 (1st Cir. 1978). In Feeley the First Circuit rejected the "strict scrutiny" method of analysis which had been utilized by Judge Garrity in this case, but it specifically avoided any comment on the Inmates result.

the principles of finality indisputably apply. Certainly where, as here, the consent decree represents a settlement of a disputable issue, it constitutes no greater offense to federalism principles than a litigated decree which could have followed a failure to settle. Here, Judge Garrity did in fact rule that single occupancy was a "critical" feature of the plan for the new facility; this was an indispensable component of his approval of the plan. (J.A. 55). Had petitioner submitted a plan for multiple occupancy and failed to appeal its rejection, the posture of the case would in effect have been the same, yet there would be no argument that principles of finality do not apply.

Second, the government officials in this case were fully authorized under state law to commit to single occupancy when they agreed to the 1979 decree and to the 1985 modification. They exercised that authority in the most public and arms-length manner imaginable -- in the forum of the court of appeals and in proceedings before the Special Master. Under state law, the Sheriff has "custody and control of the jails in his county and shall be responsible for them." M.G.L. c.126, §16. The Mayor and the City Council have the obligation to provide a "suitable jail." M.G.L. c. 34, §§3, 14. This duty is mandatory and enforceable. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985). The Commissioner himself has the power under state law to bind a Sheriff and his successors; he may require county facilities to be designed and operated according to a single occupancy plan -- and has done so in the past.^{16/} Furthermore, throughout this litigation the Commissioner has been represented by the Massachusetts

^{16/} M.G.L. c.34, §14; see, e.g. J.A. 53.

Attorney General, who has the authority under state law to conduct and settle litigation. See M.G.L. c.12, §3; Feeney v. Commonwealth, 373 Mass. 359, 366-67, 366 N.E.2d 1262, 1266-67 (1977). In any event, it is in the very nature of designing a building that certain choices must be made which become irreversible once the structure is built. In that sense, the designer necessarily binds not only successors but everyone.

Third, the petitioner's idea, if adopted, would make it virtually impossible to resolve litigation against governmental entities in any way short of adversary adjudication. Equity cases are settled by equitable relief, to wit, by consent decrees. A consent decree which one party is free to disavow has nothing to recommend it and will settle nothing. As Judge Keeton observed, to allow a party to withdraw consent and challenge the decree on the merits:

would make settlements in cases of this type worth very little. It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by the court that induces participation in it.

(Sher. Pet. 12a). In fact, except in cases of collusion, there would virtually never be a good reason for a rational plaintiff to enter a consent decree. A court order which requires a defendant to comply only when he wishes to do so is utterly unnecessary. Such a decree would not be

worth making any concessions to obtain. And by entering such an arrangement a plaintiff would cede to the defendant the ability to control the litigation, and to chose the time and context in which the plaintiff will be called upon to make the necessary record justifying relief on the merits.

In effect, therefore, petitioner's proposal would eliminate the prospect of settlement with government entities in equity cases. Yet even he does not suggest that this would be a good idea. Perhaps it belabors the obvious to state that it plainly would not. No rational system of dispute resolution places settlement beyond its reach. Indeed, there is a strong policy in favor of settlement of cases in federal court. See Local 93, 478 U.S. at 517; Evans v. Jeff D., 475 U.S. 717, 733-34 (1986); Marek v. Chesny, 473 U.S. 1, 10 (1985); Delta Airlines v. August, 450 U.S. 346, 363 (1981).

Settlement conserves judicial resources and frequently offers better, more satisfactory and finely tuned relief. Consent decrees are especially vital in the settlement of cases concerning the ongoing administration of complex enterprises. In such cases consent decrees provide the parties with the opportunity to participate in the drafting of the court's injunction, and thus most effectively to mould relief according to their true needs and interests. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L.Rev. 1281, 1299 (1979). As a general matter, this feature ensures greater sensitivity and deference to the legitimate public policy concerns of governmental defendants than does adversary judicial resolution. Thus, consent decrees tend to minimize intrusions into governmental discretion and in this way uphold the values

of federalism.

This case graphically demonstrates why parties must have the ability to settle cases by consent decree. In 1978-79, had the defendants not been able to make a binding commitment as to the planned features of confinement, there could never have been a negotiated resolution to the impasse which had developed and there would have been far more serious and harmful consequences than any now hypothesized. In that event, the First Circuit would not have permitted further use of the old jail, 573 F.2d at 101, and the district court would have had no choice but to close the jail, and possibly to order use of an interim facility of its own design as well. *Id.* Instead, the parties were able to negotiate a consent decree that better satisfied their needs than any adjudicated resolution could have done. The plaintiffs exchanged further delay for the certainty of specified relief; the whole point of the consent decree was to fix conditions of confinement in the form of an enforceable commitment. In return, the defendants obtained an eleven year extension of the life of a concededly unconstitutional facility and, except for those features specifically fixed, retained overall control over the design of the facility. See Missouri v. Jenkins, 110 S. Ct. 1651, 1663 (1990) (directing local government institutions to devise remedy is preferable to court implementing its own).

B. Rule 60(b) Requires A Showing of Equitable Circumstances.

The nature of the equitable showing necessary to warrant modification is determined directly by the nature of the consent decree. A consent decree "ha[s] attributes

of both contracts and of judicial decrees." United States v. ITT Continental Baking, 420 U.S. 223, 235-37 (1975). It is of a "dual" or "hybrid" nature. ITT Continental Baking, 420 U.S. at 236; Local 93, 478 U.S. at 519. As part contract, it draws upon contract law for the most elementary and venerable of common law principles: that parties enter certain transactions only if they know that the law will enforce their settled expectations. Local 93, 478 U.S. at 519; United States v. Armour & Co., 402 U.S. 673, 681 (1971); ITT Continental Baking, 420 U.S. at 236. Each party is willing to give something in return for the undertaking of the other precisely because the law permits it to rely upon formal, bilateral undertakings. This is both the theoretical and practical justification for contract law. (cote) At the same time, the consent decree is a court order and an exercise of the court's equitable power. The undertakings of the parties are therefore necessarily tempered by the court's power to do equity, both when the order is entered and when it is enforced. United States v. Swift & Co. 286 U.S. 106, 115 (1932).

The precise showing of equitable circumstances must, accordingly, be finely calibrated to maintain this very duality of the consent decree: to preserve the incentive to enter into consent decrees, but to make it possible to undo a particular obligation when certain unforeseen or exceptional circumstances render oppressive its continued enforcement.

If the showing is too weak, plaintiffs will be reluctant to settle cases by consent decree. And defendants will be too eager to enter them, in the hopes that concessions can be obtained from plaintiffs, with the correlative obligations avoidable at a later date. Those decrees which are entered

will be subjected to endless litigation, whenever a dissatisfied party finds it slightly more difficult to comply. In cases involving government programs and institutions, the consent decree typically is the fruit of a complicated negotiation in which agreement is reached on hundreds of issues, as the result of a series of interdependent mutual concessions. Consent decrees are typically long and complicated; once they start to unravel, it is hard to know where to stop. In such cases, courts considering excusing one party from complying with any one provision, will face the daunting task of identifying and modifying the many dependent provisions as well.

On the other hand, a legal requirement of a strong showing need not deter defendants from negotiating settlements. If necessary, the parties can always agree in a consent decree that modification will be governed by a more flexible standard for modification than the law customarily provides.

For these reasons, a district court must employ a presumption against modifying a consent decree, *Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 Tex. L. Rev. 1101, 1124, 1162 (1986); *Twelve John Does v. District of Columbia*, 861 F.2d 295, 298, (D.C. Cir. 1988) ("extraordinary remedy"); *Philadelphia Welfare Rights Org'n. v. Shapp*, 602 F.2d 1114, 1119 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (same). Under Rule 60(b)(5), the party seeking modification must shoulder the burden of establishing equitable circumstances compelling relief. *Badgley v. Santacroce*, 853 F.2d 50, 54 (2d Cir. 1988); *Philadelphia Welfare Rights Org'n. v. Shapp*, 602 F.2d at 1120; *Lubben v. Selective Service System*, 453

F.2d 645, 651 (1st Cir. 1972). Moreover, the party's burden must be stated in objective and specific terms. A standard permitting modification upon the basis of vague or subjective criteria would create the very incentives for collateral attack which a showing of equitable circumstances is designed to avoid. A court should especially not place controlling weight on the application of an amorphous term, such as the "public interest," as to which one party to the litigation (here, the government defendant) claims an exclusive power to interpret. To be sure, the public interest must be accommodated, but this is better accomplished through the application of an objective standard designed to effectuate that concern. In short, the legal standard must be articulated in such a way that a negotiating party will know that its negotiating partner will not be relieved of performance absent truly extraordinary and unforeseen circumstances.

For well over a half-century, the standard governing modification of both litigated and consent decrees has been that articulated by United States v. Swift & Co., 286 U.S. 106 (1932). According to the Swift formulation,

The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed

after years of litigation with the consent of all concerned.

Id. at 119. This standard, of course, amply satisfies the function of preserving the benefit of the bargain since under it modification is rarely granted and then only for a "clear showing of grievous wrong." *Id.*

The petitioners and the United States as *amicus curiae* argue strenuously that the *Swift* standard sets too high a threshold in "public law" or "institutional" cases and they urge various formulations of a more flexible standard for modification. (Sher. Brf. at 15; Comm. Brf. at 55; U.S. Brf. at 13-20). The Court declined to employ the *Swift* standard in *Board of Education v. Dowell*, 111 S.Ct. 630, 636 (1991), which involved a litigated decree. The Court may well conclude that modification of a consent decree on something less than a showing of "grievous wrong" can safely be permitted without doing violence to the expectational needs of the negotiated decree. But the Court should proceed cautiously in adjusting the standard, especially since any substantial weakening will have consequences for a wide array of lawsuits. Plaintiffs, in general, will claim at least comparable ability to reopen compromises, on the basis of new circumstances or new law. And state and local defendants will assert greater rights of modification against the federal government as well.^{17/}

^{17/} Apparently because it recognizes the harmful consequences of too flexible a standard, the United States suggests that when federal officials sue state and local officials, "[t]he requirements of federal supremacy would support a stringent modification test." U.S. Brf. at 28, n. 17. However, Article VI of the

In any event, if the Court does chose to employ a standard less rigorous than the Swift formulation, it will still be essential to hold the moving party to certain minimum criteria designed to preserve the integrity and efficacy of the consent decree remedy. In the absence of the Swift "clear showing of grievous wrong," a party seeking to avoid a consent decree obligation,¹⁸ must establish each of the following:

First, the party must show that the circumstances said to warrant modification were not within the reasonable contemplation of the parties when they made their agreement and could not reasonably have been anticipated. Nelson v. Collins, 659 F.2d 420, 427 (4th Cir. 1981); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d 1114, 1124 (3d Cir. 1979) cert. den. 444 U.S. 1026

Constitution establishes the supremacy of federal law, not of federal officials. The modification issue arises, by hypothesis, only when defendants assert that the consent order is not required by federal law. Thus there is no basis for concluding that federal officials would enjoy any different standard. If there is any difference, consent decrees which resolve claims of individual rights under the Constitution should be treated with greater deference than consent decrees, entered in cases in which federal agencies have sued under federal statutes.

¹⁸ The formulation of the standard here is directed to the request of an obligor to avoid an obligation. It is not addressed to a request by a beneficiary for more extensive relief in order to achieve the asserted purpose of the decree. See United States v. United Shoe Machinery Corp., 391 U.S. 244, 249 (1968) (requiring modification); Firefighters Local Union 1784 v. Stotts, 467 U.S. 561, 576-79 (1984) (disapproving modification).

(1980). In other words, the "new" circumstance must have been unforeseen and unforeseeable. If the parties agreed that a provision of the decree would govern even if a particular circumstance arises in the future, then that circumstance, when it does arise, cannot possibly form the basis for modification.^{12/} Otherwise, the standard would permit the party simply to renege on the very promise he made. For this reason, virtually every formulation of a more flexible standard for "institutional" cases advanced in the lower courts has required that the modification not be in derogation of the essential purpose of the decree.

Badgley v. Santacrose, 853 F.2d 50 (2d Cir. 1988); Plyler v. Evatt, 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988); Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 968-69 (2d Cir.), cert. denied, 464 U.S. 915 (1983); Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1120; and Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L.Rev. 1020, 1037 (1986).

Second, the proposed modification must be sought in timely fashion and in good faith. Rule 60(b) specifies that "[t]he motion shall be made within a reasonable time." "What constitutes a 'reasonable time' must be determined in the light of all the circumstances of the case." Moore's Federal Practice, ¶60.26 at 243. "The courts consider

^{12/} "If parties to a consent decree explicitly contemplated the possibility of a change in the law or of legally relevant facts and conducted their negotiations in the face of that possibility, a court addressing subsequent changes favorable to one of the parties ought to be reluctant to grant that party's request for modification." Jost, 64 Tex. L. Rev. at 1125.

whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party has some good reason for his failure to take appropriate action sooner." Wright and Miller, Federal Practice and Procedure, §2866 (citations omitted). See also Matter of Whitney Forbes, 770 F.2d 692, 697-98 (7th Cir. 1985) (consideration of prejudice and reason for delay); Jones v. City of Richmond, 106 F.R.D. 485, 487, n.2 (E.D. Va. 1985) (consideration of prejudice).

Furthermore, a showing of good faith is necessary to assure that an alleged predicate circumstance was not actually within the control of the moving party and is not simply a pretext to void an obligation. Plyler v. Evatt, 924 F.2d 1321, 1324, 1327 (4th Cir. 1991); Newman v. Graddick, 740 F.2d 1513, 1521 (11th Cir. 1984); Nelson v. Collins, 659 F.2d at 429; Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1121.

Third, the modification must be equitable to the plaintiffs in light of the concessions made by them. Plyler v. Evatt, 924 F.2d at 1324; Carey, 706 F.2d at 967-69. When a defendant is permitted to avoid a promise, the plaintiff must be relieved of its correlative undertaking. It is generally not equitable for a party to evade an obligation after he has already enjoyed the concessions made in exchange, especially if these concessions no longer can be withdrawn. Under traditional principles of equity, rescission of an agreement cannot be obtained where the court is unable to restore both parties the status quo ante.²⁰ New York Mail & Newspaper

²⁰ This is acknowledged even in the most radical proposal for modification of consent decrees. See McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from

Transportation Co. v. United States, 139 Ct. Cl. 751, 154 F.Supp. 271, 276 (Reed, J., sitting by designation), cert. denied, 355 U.S. 904 (1957).

Fourth, equity requires that the beneficiary of a consent order be deprived of a negotiated benefit only to the extent necessitated by some substantial governmental interest. There must be a clear nexus between the predicate circumstance and the inability or impracticability of complying with the decree. See, e.g., Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1120. A temporary crisis may justify temporary relief, but an ephemeral problem would not support permanent elimination of a bargained-for protection. Plyler v. Evatt, 924 F.2d at 1328-29). There must be no feasible alternative to the proposed modification which preserves the original relief. Plyler v. Evatt, 924 F.2d at 1328; Philadelphia Welfare Rights Org'n. v. Shapp, 602 F.2d at 1121.

Fifth, the movant must show that the proposed modification will not result in a constitutional or other federal law violation. See, Board of Education v. Dowell, 111 S.Ct. 630, 637. Apparently, all parties agree on the necessity of this showing. (Sher. Brf. at 32; Comm. Brf. at 30).

Political Change, Chi L. Forum 295, 305 (1987) (When the government obtains modification, a private party "must be freed of [its assumed] obligations, just as the government is freed of its obligations. Moreover, if the private party has suffered any concrete loss, the government is required to make it whole.")

**II. THE DISTRICT COURT PROPERLY
DENIED MODIFICATION SINCE THE
SHERIFF DID NOT ESTABLISH A MINIMUM
SHOWING OF EQUITABLE
CIRCUMSTANCES JUSTIFYING THE RELIEF
SOUGHT.**

Appellate review of a district court's decision to modify or to deny modification of a consent decree is for abuse of discretion. Browder v. Director, Dept. of Corrections, 434 U.S. 257, 263, 263, n. 7 (1978). An appellate court must accept any findings of fact which are not clearly erroneous. Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2458 (1990).

These principles are fundamental. A trial judge who has presided over enforcement of a decree for many years is in the best possible position to find the facts, to evaluate asserted needs, and to balance the equities. The trial judge is best able to appreciate the meaning and relative importance assigned by the parties to various provisions of the decree, in light of the conduct of the parties over time. Similarly, the trial judge is best able to measure the good faith of the moving party. Cooter & Gell, 110 S.Ct. at 2459-60; Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). And here, as in Hutto v. Finney, 437 U.S. 678, 688 (1979), the exercise of discretion is entitled to "special deference" in view of Judge Keeton's long years of experience, patience, and demonstrated sensitivity to the limits of federal judicial power, the proper role of the state courts, and the legitimate interests of the defendants.

Judge Keeton held that the Sheriff did not present equitable circumstances which justify modification under

either the Swift standard or the more lenient "flexible" rule advocated by him. (Sher. Pet. 11a, 12a). The decision was well within the court's discretion -- and was clearly correct. In fact, the Sheriff's case founders upon each and every of the requirements for modification discussed above:

1. The circumstances advanced to justify modification were well within the contemplation of the consenting parties, could have been and indeed were reasonably anticipated. The particular provision of the consent decree under review here represented the negotiated final resolution of the central legal issue remaining in the case, with full awareness both that the issue could be disputed and that the population might rise.

- a. The asserted change of law

The first alleged circumstance was a purported change of law announced by the decision of this Court in Bell v. Wolfish, 441 U.S. 520 (1979). However, the district court concluded that this decision did not constitute the kind of change in law sufficient to justify modification. (Sher. Pet. 10a). Bell does not prohibit the relief. It did not hold that double ceiling is per se constitutional, much less that single occupancy offends some federal statutory or constitutional policy. Compare, System Federation No. 91 v. Wright, 364 U.S. 642, 647 (1961). As we show below, under Bell, the constitutional issue depends upon a thorough and searching development of the facts.

Petitioners' contention, instead, is that under Bell the plaintiffs would not be entitled to the relief, if the issue were litigated on its merits today. But even assuming that

this were so,^{21/} Bell did not represent any change in law at all. At the time the decree was negotiated, the law of the First Circuit on the issue of single occupancy was unsettled.^{22/} And, during the entire course of the negotiations, Bell was literally sub judice in this Court.^{23/} When parties agree to settle a legal issue which they know can go either way, they can hardly complain when, inevitably, the issue is resolved one way or the other in another case. Cf. Airline Pilots Assoc. v. O'Neill, 110 S.Ct. 1124, 1136 (1991) ("A settlement is not irrational simply because it turns out in retrospect to have been a bad

^{21/} But see Section 5, at p. 49, infra.

^{22/} Feeley v. Sampson, 570 F.2d 364 (1st Cir. 1978). See note 15, supra.

^{23/} In an article upon which petitioners place extremely heavy reliance, Professor Jost predicted this case:

Modification [based upon a contemplated change in law] threatens the bargain the parties struck and the reliability of future consent decrees. For example, a class of prisoners may have extracted from the state a commitment to abolish double-celling in exchange for abandoning other claims regarding prison overcrowding or security. A subsequent Supreme Court decision holding double-celling constitutional in some circumstances does not justify modification of the decree to deprive the prisoners of this hard-won benefit. Unless changes in the law render the original decree illegal, modification of consent decrees to conform to legal changes contemplated by the parties in negotiating the decree should rarely be granted.

Jost, 64 Tex. L. Rev. at 1135-36.

settlement.") (emphasis in original).

Moreover, as Judge Keeton found, the agreed upon standard of single occupancy represented "one of the primary purposes of the decree." (Sher. Pet. 12a). There is no ambiguity here about what the parties intended. Compare Pasadena City Board of Education v. Spangler, 427 U.S. 424, 438, (1976). There were two essential components, each of which is directly implicated by the motion to modify. First, the overall purpose of the decree was to achieve certainty and reliability in the conditions of the new jail: to avoid further litigation as to what features would be included and to incorporate these specific elements in an enforceable form. Given the context, the characterization by the petitioner Commissioner, Comm. Brf. at 46-47, of the consent decree as no more than an open ended agreement to create constitutional conditions -- whatever they may turn out to be -- is disingenuous in the extreme. In 1978, the plaintiffs had already possessed just such a promise for five years, with no fulfillment in sight. The entire point of the consent decree was to actualize the promise and to provide a commitment on specifics which could be relied upon -- that is, to prevent the very thing which petitioners would now do: make a critical change too late in the day to readjust.

Second, within this framework, single occupancy was the key, bargained-for item of relief. For twenty years single occupancy has been the central focus of the lawsuit. For ten years it has been the core feature of the design of the new jail. Plaintiffs have consistently sought this relief from the beginning. They prayed for it in the original

request for relief after trial,^{24/} and still again after while the case was under advisement,^{25/} after a prisoner was clubbed to death by his cellmate. (Sher. Pet. 27a). Judge Garrity singled out the "unequivocal commitment" to single occupancy as a "critical feature" of the defendants' plan for replacing the jail, which led him to delay closing the old jail. (J.A. 55). Plaintiffs obtained the relief in the consent decree and, again, in the consented-to modification in 1985.^{26/} All tolled, plaintiffs agreed upon what amounted to a staggering delay in implementation in order to obtain this relief -- 17 years from entry of the original judgment, 10 years from the entry of the consent decree. Plaintiffs made other, substantive, concessions as well, including a reduction in the area per cell.

Most importantly, single occupancy became the linchpin of the design of the jail. All of the other aspects of the jail design, affecting the safety and privacy of the occupancy of the cells, were directly premised upon this design. In every sense, then, the single occupancy requirement was the very essence of the bargain.

^{24/} Plaintiffs' Proposed Order, June 30, 1972, at ¶s2, 4.

^{25/} Plaintiffs' Motion to Reopen Proceedings, July 20, 1972.

^{26/} Plaintiffs also successfully opposed two attempts by the Sheriff to modify the single cell order at the old jail -- one in 1984 to double bunk detainees in the south wing of the jail and the other in 1989 to double bunk detainees in the modular cells. See p. 11 and note 8, supra.

b. The asserted change in fact.

It was similarly understood at the time the consent decree was negotiated that the jail population was subject to increase, even if specific population rises could not be predicted. As Judge Keeton found: "[i]t has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." (Sher. Pet. 10a-11a). It is true, as petitioners point out, that the original consent decree provided for a 309 prisoner population -- and thus the increase noted by Judge Keeton in April 1985 was "unanticipated." (J.A. 110). But the precise size of the jail had never been an essential element of the agreement. Neither the plaintiffs nor the court have ever had any interest in how large the jail was -- so long as the conditions were according to the agreed standards. Thus when, in 1984, it became clear that the facility was too small, the Sheriff initiated state court litigation seeking to obtain a larger facility -- on the express premise that each additional inmate would require an additional room. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 626, 477 N.E.2d 361 (1985).

But most significant of all, in 1985 the decree was modified, again by consent, to permit the defendants to build a jail of any size, provided, expressly, that single cell occupancy was maintained. (J.A. 110). This consented-to modification is dispositive of the issue here, for two reasons. First, it establishes explicitly that the single cell occupancy requirement is and was not intended to be tied to the size of the population in the decree. Second, it demonstrates beyond any doubt that at least by 1985, when the single occupancy order was reiterated and strengthened, all parties were well aware that the

population was in fact likely to rise -- this was the whole idea of modifying the decree to make the capacity of the jail an open-ended feature.

2. Modification was not sought in timely fashion. Bell v. Wolfish was decided seven days after the original decree was entered. It was unreasonable for the Sheriff to wait for ten years, particularly after reaffirming the single cell provision in 1985, to assert for the first time that Bell was a "new" circumstance requiring relief. And it was manifestly unreasonable for him to wait until after the design features of the new jail were unchangeable -- and even built.^{27/}

Similarly, as to the rise in population, the district judge found that there was a "marked upward trend in the numbers held in the Sheriff's custody since 1985." (Sher. Pet. 11a). It was unreasonable for the Sheriff to wait until the design of the facility could no longer be changed or its capacity increased. Indeed, the Sheriff has conceded that he deliberately "chose" not to make such a motion in at a time when the jail still could have been redesigned -- either to add more rooms, or to change the configuration. (J.A. 208). This decision can hardly be characterized as in keeping with a good faith effort to fulfill his decree obligations and was calculated to render the "need" to double-cell a self-fulfilling prophecy.

3. There is no way to relieve the plaintiffs of the

^{27/} The Commissioner, of course, never moved the district court to modify and never even supported the Sheriff's motion in the district court. His first request for relief was made when he appealed the denial of the Sheriff's motion.

correlative burdens which they assumed under the decree. The initial, general consideration for the consent decree was a further delay in confinement under unconstitutional conditions beyond October 1978. As it turned out, the delay was eleven years. The Sheriff pressed his motion only when plaintiffs' undertakings were fully discharged, but before his own had even begun.

Moreover, the single cell occupancy requirement was the core feature of the design of the new facility. The entire housing scheme was based upon this assumption. Most importantly, the architects utilized this feature to develop a unique plan to insure privacy for the detainees. Unlike the plan of virtually every other jail in the United States, the plan here -- involving the configuration of the individual cells, the design of the cell doors and windows and the layout of the cells within the housing units -- was to minimize visual observation of the interior of the cell and thus to maximize privacy. The indispensable premise of this design was that use of each cell was to be by no more than one detainee. Similarly, the cell size was set at half the Massachusetts minimum for double occupancy.

105 C.M.R. §§450.321^{28/}; 103 C.M.R. §972.03(2)^{29/}. Indeed, relying upon the single occupancy guarantee, plaintiffs agreed to a reduction of the 80 square foot design contained in the original plan. (See J.A. 55). Obviously, placing two detainees in this type of cell would create dangers not even present in the old facility. The result of utilizing this unique single occupancy design for double occupancy would convert the very reforms promised by the decree into instruments which threaten the safety and destroy the privacy of the detainees. In a real sense, the detainees would have received the "worst of both worlds."

4. Notwithstanding the hyperbole in their briefs, the petitioners have never demonstrated that modification is needed to accommodate the Suffolk County Jail population or that, even if an increase in capacity is needed, there are no feasible alternatives to the permanent dismantlement of the carefully negotiated agreement of the parties.

^{28/} 105 C.M.R. §450.321 provides that:

Each cell or sleeping area in a new facility or a part of a facility constructed or renovated after the effective date of these regulations contains at least 80 square feet of floor space for the first occupant and 60 square feet for each additional occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet.

^{29/} 103 C.M.R. §972.03(2) provides that:

Multiple occupancy cells or dormitories shall have at least sixty (60) square feet of floor space for each inmate and where double bunks are used, a minimum ceiling height of nine (9) feet.

The record contains no evidence supporting the dire forecasts of the petitioners that the public interest would be harmed. In fact, there is no evidence in the record that the new jail is not fully able to accommodate the pre-trial detainee population. At the time the Sheriff's motion was heard by the district court, in March of 1990 -- prior to the opening of the new jail -- the average number of persons committed to the Sheriff's custody was 370. (J.A. 243). The capacity of the jail then in use, Charles Street, was 342. (J.A. 244). Even with this imbalance, the population was accommodated through use of a myriad of measures which operated either at the discretion of the Sheriff and the Commissioner or at the direction of the Supreme Judicial Court. None of these measures involved the federal court. In no case was a single prisoner released.^{30/}

^{30/} The other Sheriffs of the Commonwealth, as amici curiae, state that there have been 241 "releases" in Suffolk County as a result of jail overcrowding. (Brf. at 21). This is simply not the case. The number 241 refers not to releases from custody, but to transfers to a halfway house under Order No. 16 of the Supreme Judicial Court. Although Order No. 16 authorizes releases on personal recognizance, there is no evidence in the record that this was actually ever done. Moreover, Order No. 16 contains its own method of prioritizing the detention of prisoners, according to state standards. Under the order, detainees charged with crimes of violence are not to be considered unless no suitable detainees charged with property crimes can be identified. Furthermore, personal recognizance is not to be entertained unless there is no halfway house capacity. (C.A. App. 389).

Prior to opening of the new jail, one of the measures frequently used was the transfer of detainees to other county

When the new jail opened two months later, the Sheriff immediately gained an additional 71 cells, bringing the total male capacity to 413.^{31/} The Sheriff and the Commissioner consistently obscure the fact that on opening day the new jail was to have a single occupancy capacity which was greater than the average detainee population. The new jail has now been in operation under the single cell occupancy order since May of 1990. The record, of course, contains no evidence of actual experience since the new jail opened.^{32/}

facilities. Petitioners argue that when such transfers are made, detainees are sometimes double bunked in facilities inferior to Nashua Street. Petitioners ignore, however, that Suffolk County detainees are held in other counties only for a short period of time -- usually just a matter of days -- before they are returned to the Suffolk County Jail. These inter-county transfers, which may result in double bunking on an emergency and temporary basis, are fundamentally different from double bunking on a permanent basis at the Suffolk County Jail as proposed by the Sheriff.

^{31/} As noted above, the male capacity has been increased to 419. See note 11, supra.

^{32/} The Sheriff states in his Brief that "since the opening of the Nashua Street Jail the number of male inmates committed to the Sheriff's custody has remained in excess of the 419 cells available." (Sher. Brf. at 38). This is not in the record (J.A. 243) and is not correct.

The Massachusetts legislature has appropriate funds for a massive jail and prison construction program. It has appropriated funds for construction of new county correctional facilities in Suffolk (1986 Mass Acts c.658, §1), Hampden (1986 Mass. Acts. c.658, §4) Essex (1985 Mass. Acts. c.799, §8) and Norfolk counties (1985 Mass. Acts c.799, §8), and for

Furthermore, neither petitioner has ever explained why nothing less than the permanent revision of the decree is required. The Sheriff refused to consider adding temporary cells, even though he used precisely this expedient in the past.^{22/} More fundamentally, even if, contrary to the record, there was insufficient ability to detain prisoners under the decree, this would require at most a temporary waiver of the Sheriff's obligation, pending the creation of more cell space. In 1984, in response to an increase in population the Sheriff sought and obtained more space, receiving a receptive ear from both the state court and the state legislature. Indeed, the Supreme Judicial Court held that the Mayor and City Council of the City of Boston have a mandatory, enforceable duty to provide a jail of sufficient size to comply with the requirements of the federal consent decree. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 477 N.E.2d 361 (1985).

5. Finally, the petitioners here have not carried their burden of demonstrating that the proposed modification

several new state correctional facilities, as well. (1986 Mass. Acts c.658, §5).

^{22/} Modular cells were installed at the old Charles Street Jail by agreement of the parties to increase the capacity and have been used by the Commissioner as well. (C.A. App. 587; Inmates of the Suffolk County Jail v. Kearney, No. 89-1583 (1st Cir. November 13, 1989)). Plaintiffs proposed the installation of prefabricated modular cells in the rear yard of the new jail, as an alternative to abrogation of the single cell order. Modular cells could create an immediate increase in the total capacity of the jail of 48. (J.A. 236-38, 266-69).

will not result in a constitutional violation.

The Sheriff's proposal would double bunk 394 inmates, or 64% of the entire male population. Under the proposal, detainees would be confined in extremely close quarters for 12 hours per day, in "hermetically sealed" cells in which their movements cannot be kept under surveillance. (J.A. 183, 261-65). In this situation "regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions" (J.A. 27a) is as assured as it was at the old Charles Street Jail.^{24/} The detainees would be exposed to this regime over the course of lengthy commitments, lasting well over 60 days. (C.A. App. 653). It would not be an exaggeration to say that if such conditions were permitted to occur, experience would reveal a substantial and palpable threat to the personal safety of the detainees. Plaintiffs' concern is anything but fanciful: one inmate was murdered by his cellmate while the case was originally under advisement. (Sher. Pet. 27a). And the problem has little to do with the modernity of the facility; one can be as seriously injured in a new jail

^{24/} Pre-trial detainees are clearly under enormous stress: Pre-trial detainees are the most difficult individuals to keep in custody. They experience much greater tension than sentenced inmates. These tensions are a result of their unexpected arrest and incarceration, their inability to communicate with their family and friends, and their not knowing how long they will be held in custody, whether they can raise the money for bail when they will be tried, what is happening to their families and their possessions or what the outcome of their trial will be. Affidavit of former Sheriff Buckley. (J.A. 188-89).

as an old one.

Under these circumstances, the single occupancy remedy is necessary as a protection against constitutional deprivation. The plaintiff class is composed of pre-trial detainees who, under Massachusetts law, are detained only to secure their appearance for trial. M.G.L. c. 276 §58; Comness v. Comm., 369 Mass. 368, 339 N.E.2d 917 (1975). There are, therefore, two sources of authority, both rooted in the Due Process Clause. Under the first doctrine, an inmate enjoys the affirmative, substantive due process right to be protected, while incarcerated, in respect to the basic necessities of human life, and is specifically entitled to "reasonable safety." DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005 (1989); Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982). In Youngberg, the Court upheld the claim of an involuntarily committed mentally retarded person that he had a due process right not to be exposed to "unsafe conditions," acknowledging the "right to personal security" as an "historic liberty interest." See also, Revere v. Massachusetts General Hospital, 463 U.S. 241, 244-45 (1983) (medical care); Hutto v. Finney, 437 U.S. 678 (1978) (convicted persons have Eighth Amendment right to safe conditions); Estelle v. Gamble, 429 U.S. 97 (1976) (Eighth Amendment right to medical care).

Under the other line of authority, no unconvicted detainee may be subjected to any condition or restriction which amounts to "punishment". Bell v. Wolfish, 441 U.S. at 535. Accordingly, any condition of confinement to which a detainee is exposed is unconstitutional if it is imposed with the express intent to punish or is not reasonably related to a legitimate governmental objective,

in which case an intent to punish may be inferred. Bell, at 538-39; Schall v. Martin, 467 U.S. 253, 269 (1984); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). In Bell the Court surveyed a number of practices at a pre-trial detention center. The Court held that the practice of double celling a small portion of the detainees in a facility, 441 U.S. at 527, n. 4, for short periods of confinement, (generally less than sixty days), id. at 543, and only while they slept, id., did not constitute punishment. The Court reasoned that "[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility." Id. at 537. The Court made clear, however, that there was no per se rule and that in another case, there might be another result.^{35/}

The district court found it unnecessary to decide the underlying constitutional issue, and, accordingly, held no evidentiary hearing and made no findings on the point. (Sher. Pet. 12a). Nevertheless, without the single occupancy order, the detainees of the jail would be exposed to an unreasonable risk to their safety and, therefore, to unconstitutional conditions under either theory.

^{35/} The Court noted:

While confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.

Id. at 542 (footnote omitted).

The contemplated conditions are far more serious than anything considered by the Court in Bell -- whether measured by danger threatened, hours per day exposed,^{26/} the total length of confinement, or the number of inmates involved. While loss of privacy is a necessary concomitant of even pre-trial confinement, surely the risk of assault, rape or death is not.

Moreover, neither the Sheriff nor the Commissioner has ever contended that double celling is desirable in any way, except as a matter of expediency. Indeed, except for cases of emergency, the Commissioner prohibits the practice in cells of this size. 105 C.M.R. §972.03(2).^{27/} See Hutto v. Finney, 437 U.S. 678, 688 (remedy did not interfere with official discretion where Commissioner of Correction himself disapproved practice). The Sheriff does not recommend the practice; he merely minimizes it, arguing that by adopting a system of classifying prisoners, he could reduce, although not eliminate, the threat. On this record, even that proposition is highly unlikely, as the Sheriff has never explained why he believes that two-thirds of the detainee population would be "suitable" for double-

^{26/} In Bell, for example, the court was unimpressed with the limitations in "walking space," 441 U.S. at 543, n.26, because inmates were only in the rooms to sleep and "[t]he rooms provide more than adequate space for sleeping." Id. at 543. In the new jail, however, where inmates would be confined in their cells for much more than sleeping, the actual amount of "moving around space" is even smaller than in the old jail, i.e. less than 40 square feet per cell. (J.A. 185).

^{27/} See note 29, supra.

bunking.^{38/} But more fundamentally, the detainees are entitled as a matter of substantive due process to be protected from any unreasonable risk of physical harm.^{39/}

The defendants have failed to carry their burden to show that the decree is not necessary to prevent a constitutional violation. On a Rule 60(b) motion, it is the defendants, not plaintiffs, who bear the burden of proof on any element. In any event, even on the Bell theory, the Sheriff's decision to run the risk of a serious injury for 64% of the population, without having any demonstrable need to do so, cannot be characterized as reasonably related to any lawful purpose. Altogether, the Sheriff's chain of decisions -- to forego the opportunity to redesign, and then to double cell -- would constitute, at least, deliberate indifference to his obligations under the decree and to the safety of the prisoners.

^{38/} J.A. 143.

^{39/} See Dace v. Solem, 858 F.2d 385, 388 (8th Cir. 1988); Vosburg v. Solem, 845 F.2d 763, 766 (8th Cir. 1988) (evidence that guards could not see into double bunked cells); Morgan v. District of Columbia, 824 F.2d 1049, 1057 (D.C. Cir. 1987); Alberti v. Klevenhagen, 790 F.2d 1220, 1284 (5th Cir. 1986); Riley v. Jeffes, 777 F.2d 143, 147 (3d Cir. 1985); Withers v. Levine, 615 F.2d 158, 161 (4th Cir. 1980) cert. denied, 449 U.S. 849 (1980).

CONCLUSION

The judgment of the court of appeals should be affirmed. Alternatively, the Court should accept the suggestion of the United States to remand for further consideration.

If the Court does remand for further consideration, it should direct that the district court to consider the motion in light of current circumstances. The original hearing before the district court took place on March 30, 1990. Naturally, the factual situation has continued to evolve. Any reconsideration of the motion should be made on the basis of current reality.

Respectfully submitted,

Max D. Stern
Counsel of Record
Lynn Weissberg
Stern, Shapiro, Rosenfeld
& Weissberg
80 Boylston Street, Suite 910
Boston, MA 02116
(617) 542-0663

Alan B. Morrison
Public Citizen Litigation
Group
2000 P Street, NW, Suite 700
Washington, D.C. 20036

Dated: May 30, 1991

**In the
Supreme Court of the United States.**

October Term, 1990

**ROBERT C. RUFO, et al.,
Petitioners in No. 90-954**

v.

**INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.**

**THOMAS C. RAPONE,
Petitioner in No. 90-1004**

v.

**INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.**

**On Writs of Certiorari to the
United States Court of Appeals
for the First Circuit**

**REPLY BRIEF OF RESPONDENT
THOMAS C. RAPONE**

**SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS**

**John T. Montgomery
Jon Laramore
Douglas H. Wilkins
Counsel of Record
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617)727-2200**

411



TABLE OF CONTENTS

I.	THE CONSENT DECREE SHOULD BE MODIFIED BECAUSE ITS PURPOSE HAS BEEN FULFILLED AND NO CONSTITUTIONAL VIOLATION REMAINS.	2
II.	THE COMMISSIONER'S STANDARD FOR MODIFYING PUBLIC LAW CONSENT DECREES PROTECTS INTERESTS IN SETTLEMENT AND FINALITY.	19
A.	The Proposed Standard Does Not Remove Incentives for Settlement of Public Law Cases.	19
B.	The Commissioner's Standard Does Not Undermine Finality and Certainty.	23
III.	THE INMATES' SUGGESTED STANDARD FOR MODIFICATION IS IMPRACTICAL AND INEQUITABLE.	26
A.	The Parties Appear to Agree That The <u>Swift</u> Standard Is Not Appropriate for Public Law Cases.	26
B.	The Inmates' Standard Is Impractical and Would Harm Important Public Interests.	27
	CONCLUSION	36

Table of Authorities

Cases

<u>Bell v. Wolfish,</u> 441 U.S. 520 (1979)	16
<u>Board of Education of Oklahoma City v. Dowell,</u> 111 S.Ct. 630 (1991)	3, 4, 5, 8
<u>City of Los Angeles v. Lyons,</u> 461 U.S. 95 (1983)	8
<u>City of Columbia v. Omni Outdoor Advertising, Inc.,</u> 111 S.Ct. 1344 (1991)	33
<u>Firefighters v. Stotts,</u> 467 U.S. 561 (1984)	9, 35
<u>Harlow v. Fitzgerald,</u> 457 U.S. 800 (1982),	33, 34
<u>Local No. 93 v. Cleveland,</u> 478 U.S. 501 (1986)	5, 6, 7
<u>Milliken v. Bradley,</u> 418 U.S. 717 (1974)	8
<u>Milliken v. Bradley,</u> 433 U.S. 267 (1977)	5
<u>Philadelphia Welfare Rights Org. v. Shapp,</u> 602 F.2d 1114 (3d Cir. 1979) <u>cert. denied</u> 444 U.S. 1026 (1980)	21
<u>Rhodes v. Chapman,</u> 452 U.S. 337 (1981)	16

<u>System Federation v. Wright,</u> 364 U.S. 642 (1961)	5, 25
<u>United States v. Swift & Co.,</u> 286 U.S. 106 (1932)	26, 28
<u>Wilson v. Seiter,</u> 59 U.S.L.W. 4671 (U.S. June 18, 1991)	17, 18

Rules

Fed. R. Civ. P. 60(b)	11, 18, 19, 23, 28, 29, 36
-----------------------	-------------------------------

Publications

Arnold, "Locking Up Charles Street Jail's Colorful Past," <u>Boston Globe</u> , June 18, 1991	13
Chayes, <u>The Role of the Judge in Public Law Litigation</u> , 89 Harv. L. Rev. 1281 (1979)	20
Fiss, <u>The Forms of Justice</u> , 93 Harv. L. Rev. 1 (1979)	25
Schwarzschild, <u>Public Law by Private Bargain: Title VII Consent Decrees and The Fairness of Negotiated Institutional Reform</u> , 1984 Duke L. J. 887	21

Nos. 90-954, 90-1004

In the Supreme Court
of the United States
October Term, 1990

ROBERT C. RUFO, et al.,
Petitioners in No. 90-954

v.

INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

THOMAS C. RAPONE,
Petitioner in No. 90-1004

v.

INMATES OF THE SUFFOLK COUNTY JAIL,
Respondents.

The Commissioner of Correction of
Massachusetts submits this reply to
respondents' brief on the merits
pursuant to Supreme Court Rule 25.3.

I. THE CONSENT DECREE SHOULD BE MODIFIED
BECAUSE ITS PURPOSE HAS BEEN
FULFILLED AND NO CONSTITUTIONAL
VIOLATION REMAINS.

The Commissioner argued in his initial brief that the consent decree in this case must be modified because the purpose of the consent decree has been fulfilled and the new Suffolk County Jail surpasses all constitutional requirements. Commissioner's Brief at 30-50. Because these conditions have been met, the district court must modify the decree and allow the Sheriff to perform his legal duty to administer the jail. The inmates misstate this argument, contending that the Commissioner seeks authority unilaterally to obtain modification of the decree at any time after its entry. Inmates' Brief at 22-25. The inmates

grossly exaggerate the terms and effects of the Commissioner's position. Also, contrary to the inmates' contentions, adoption of the Commissioner's position would neither destroy incentives to settle litigation nor undermine the interests in finality and stability of judgments.

1. The consent decree should be modified because it no longer is equitable to require the Sheriff to hold inmates one-per-cell now that the purpose of the consent decree has been accomplished. This position is consistent with this Court's decisions about the proper scope of the equitable power of the federal courts.

This Court recognized the fundamental limits on federal courts' authority most recently in Board of Education of Oklahoma City v. Dowell,

111 S.Ct. 630 (1991). Dowell held that when the purpose of a desegregation decree is fulfilled, the district court must vacate its decree mandating the transfer of pupils. This Court held that the district court must do so because "[c]onsiderations based on the allocation of powers within our federal system" required federal judicial deference to local control of education. Id. at 637. "The legal justification for displacement of local authority by an injunctive decree . . . is a violation of the Constitution by the local authorities," id., and the injunction should end when the violation has been corrected. "Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the

Constitution or does not flow from such a violation" Id., quoting Milliken v. Bradley, 433 U.S. 267, 282 (1977). Although the order in Dowell was entered after trial rather than by consent, the limitations this Court described regarding the district court's equitable authority are fully applicable here. System Federation v. Wright, 364 U.S. 642, 650-651 (1961) (same standard for modification of consent decree and litigated decree).

The Commissioner's position also comports with Local No. 93 v. Cleveland, 478 U.S. 501 (1986), insofar as Local 93 is relevant to this case.^{1/} Local 93

^{1/} But see Inmates' Brief at 24-25; Brief of Lawyers Committee for Civil Rights at 21-22; Brief of American Civil Liberties Union at 9-11; Brief of Center for Dispute Settlement at 16; Brief of Allan Breed at 12 (all arguing that Local 93 precludes the Commissioner's argument).

states that, at least in cases involving statutory claims, a federal court is "not necessarily barred" from approving a consent decree that grants parties remedies beyond those authorized by law. Id. at 525.

Contrary to the inmates' claim, Inmates' Brief at 24-25, the Commissioner does not argue that the district court lacked the power initially to enter the consent decree in this case. To the contrary, the Commissioner's argument in this case does not contest the court's power to enter the decree initially, but rather contests the courts' power to deny modification when the purposes of the decree have been accomplished.

Local 93 simply does not address the district court's power to modify consent decrees in situations such as this case,

where the purposes of the decree have been fulfilled and the legal wrongs addressed in the decree have been completely corrected. Moreover, Local 93 specifically reserved the question whether a court may decline to modify a decree whose requirements exceed the limits of the law. Id. at 528. Thus, Local 93 is of little relevance to the central issue presented by the Commissioner's petition.^{2/}

2/ Local 93 also differs from this case because neither the original parties nor the intervenor argued that any portion of that consent decree was unlawful; the intervenor simply argued that the consent decree was unwise and unnecessary. Id. at 511, 529. In this case, in contrast, the Commissioner argues that equitable principles require the district court to modify the consent decree. Particularly because this specific objection has been raised by a party, as it was not in Local 93, the court is required to make a searching examination of its power to continue to administer the decree.

By modifying the decree in the circumstances presented here, the district court properly would confine its equitable authority within recognized boundaries.^{3/} When the underlying federal wrong has been corrected, and will not recur, the federal court has no basis to continue to control the day-to-day functioning of the jail. Dowell, 111 S.Ct. at 637.^{4/}

3/ These issues of federal judicial power are particularly important when the continuing injunction runs against a local governmental entity. See Milliken v. Bradley, 418 U.S. 717, 741-742 (1974).

4/ At some point in a case such as this, where unconstitutional conditions have been cured, there is no longer a "case or controversy" on which to base Article III jurisdiction. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983) (no case or controversy when defendants have ceased practice alleged to be unconstitutional).

2. There can be no doubt in this case that the terms of the consent decree have been fulfilled and its purpose has been accomplished. The purpose of a consent decree is determined "within its four corners," Firefighters v. Stotts, 467 U.S. 561, 574 (1984), and the decree in this case states that it is meant to provide inmates with a "suitable and constitutional jail." Sheriff's Petition at 15a. As explained in detail in the Commissioner's initial brief, the new Suffolk County Jail is the most modern in Massachusetts. Commissioner's Brief at 3-4. It is a new structure, on a new site, with modern modular construction and amenities including indoor and outdoor recreation areas, laundry facilities for inmates, and extensive libraries and visiting areas.

Id.

The inmates fail to explain why, if single-celling was central to the consent decree, single-celling is never mentioned within the four corners of the 1979 decree. In asserting that single-celling was central to the decree they rely not on the language of the decree, but rather on the district court's finding that, under the conditions that prevailed at the old jail, double-celling was unconstitutional. Inmates' Brief at 8. This rhetorical tactic fails to prove that the parties who consented in 1979 considered single-celling to be a central element of their agreement regarding a new jail. The inmates' reliance on a 1978 order of the district court, rather than the language of the 1979 consent decree, constitutes a post

hoc rationalization rather than principled argument.

3. The inmates contend that the Sheriff and Commissioner failed to show equitable circumstances supporting modification. Inmates' Brief at 38-54. This argument is clearly wrong. The Sheriff and Commissioner have made a compelling showing that "it is no longer equitable that the [consent decree] should have prospective application." Fed. R. Civ. P. 60(b)(5).

The Sheriff and the Commonwealth have fulfilled their duties under the consent decree by constructing a new "state of the art" jail. If the request for modification is denied, the people of Massachusetts will suffer further disruption of the Commonwealth's correctional system, the continued release of persons who have been ordered

by courts to be held pending trial, and the public cost of the expensive system of inmate transfers made necessary by the district court's refusal to modify the decree. See Commissioner's Brief at 3-4, 16-23; Sheriff's Brief at 5-6, 18, 39-40; J.A. 115-116, 118-121, 123-125, 138-140, 209-215.^{5/}

The inmates, in contrast, allege only two items of harm if the consent decree is modified. First, they argue that as a class they will "lose" eleven years -- from the 1979 consent decree to the opening of the new jail in 1990 -- of poor conditions at the old jail which they "traded" for the promise of single-celling at the new jail.

^{5/} Moreover, absent modification many inmates would continue to be double-celled in facilities far less modern than the new Suffolk County Jail. Commissioner's Brief at 74.

Inmates' Brief at 29. Of course, they point to no record evidence or term of the decree which verifies this alleged "trade." Moreover, it is disingenuous for the inmates to contend that the old jail failed to meet constitutional standards for the 11-year period. There was no finding to that effect, and major renovations were made to the structure during the 11-year period, including renovation of the heating, electrical and plumbing systems criticized by the district court in its original orders and other improvements. Court of Appeals App. 690, 1027-1035.^{6/} Moreover, in the consent decree the inmates did not

^{6/} The facility was of sufficient quality that, when pretrial inmates were moved out, sentenced inmates committed to the custody of the Commissioner were housed there. Arnold, "Locking Up Charles Street Jail's Colorful Past," Boston Globe, June 18, 1991, at 1, 12 col. 3.

surrender their right to enforce the Constitution at the old jail during construction of the new jail. Yet the record shows that they made not a single attempt to enlist judicial assistance in improving conditions at the old jail between 1979 and 1990. See Court of Appeals App. 14-70 (docket). If the Sheriff's improvements to the old jail were insufficient, nothing prevented the inmates from seeking judicial relief either before or during construction of the new jail.

The inmates' argument that they "traded" a period of unconstitutional conditions at the old jail for perpetual single-celling at the new jail thus is overstated. When the consent decree was executed, the Sheriff was under a threat of imminent closing of the jail unless he could develop a plan for a new jail.

J.A. 35. Under those circumstances, the Sheriff and inmates had limited alternatives, none of which suggests that the inmates could "trade" time for perpetual single-celling in the new jail. If the Sheriff had failed to submit a plan, the jail would have been closed and the inmates housed in some undetermined location (perhaps in other counties). Alternatively, the Sheriff could have submitted a plan for a constitutional jail, either with or without the inmates' participation and agreement. The inmates, like most plaintiffs in institutional reform litigation, sought to participate in developing the plan. Thus, they "traded" their consent for a role in shaping the plans for the new jail, not for a specific element of the plan, such as single-celling.

Second, despite Bell v. Wolfish, 441 U.S. 520 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981), the inmates state that housing two inmates per cell at the new jail is unconstitutional. Again, there is no finding of fact on the evidence below to support this argument. The inmates' one-sided recitation of the evidence on this topic, Inmates' Brief at 16-17, omits any reference to the substantial evidence presented by the Sheriff that inmates could be double-celled safely in the new jail. The Sheriff adduced expert testimony to this effect, as well as testimony from more than a dozen other correctional facilities stating that double-celling did not increase the dangers to inmates. J.A. 142-144, 195-206; Court of Appeals App. 300, 694-695, 785-798.

In any event, the inmates cannot show that double-celling would cause a constitutional violation. The Sheriff's decision to double-cell reflects careful consideration of the security issues raised by the proposed modification and is based on reasonable advice from experts. The inmates do not suggest that the Sheriff's proposal embodies "deliberate indifference" to the inmates' rights, see Wilson v. Seiter, 59 U.S.L.W. 4671, 4673 (U.S. June 18, 1991), they only suggest that the Sheriff's judgment is incorrect.^{7/} Even if the Sheriff's judgment turns out to be wrong, the Sheriff himself, not the federal court, should have the

^{7/} In its brief at 27-32, the American Civil Liberties Union argues with particular ferocity that the district court should pre-empt the Sheriff's judgment that the inmates would be safe if double-celled.

first opportunity to act to cure the problem. Only if double-celling creates new problems at the jail and the Sheriff fails to remedy those problems may the inmates seek judicial intervention.

Id.^{8/}

Thus, under the equitable standard of Rule 60(b), the balancing of factors requires modification.^{9/} The burdens

8/ For example, if, as the inmates assert, double-celling leads to security problems because the cell doors do not allow guards to hear disturbances, Inmates' Brief at 50-51, the Sheriff could replace those doors with traditional barred doors that allow sound to travel freely. The Sheriff should have the opportunity to take such actions on the basis of experience, rather than on the basis of a federal court's prophylactic order.

9/ Contrary to the inmates' statement in their brief at 22, the Commissioner does not argue that there need be no equitable showing prior to modification. As explained in his initial brief at 30-50 and in this reply brief, the Commissioner argues that an analysis of the equities requires modification pursuant to Rule 60(b).

on the public and law enforcement, when weighed against mere speculation about burdens on inmates at the new, "state of the art" jail, required the district court to rule that the consent decree be modified because it was no longer equitable. Fed. R. Civ. P. 60(b); see Commissioner's Brief at 71-75.

II. THE COMMISSIONER'S STANDARD
FOR MODIFYING PUBLIC LAW CONSENT
DECREES PROTECTS INTERESTS
IN SETTLEMENT AND FINALITY.

A. The Proposed Standard Does
Not Remove Incentives for
Settlement of Public Law Cases.

The standard proposed by the Commissioner does not eviscerate incentives to settle litigation. But see Inmates' Brief at 27; Brief of Allan Breed; Brief of Center for Dispute Settlement; Brief of American Civil

Liberties Union at 39; Brief of Lawyers Committee for Civil Rights at 5 (all arguing to the contrary).

Under the Commissioner's standard, the powerful incentives to settle public law litigation remain intact. Most important, parties in public law litigation generally desire to settle litigation because, through settlement, they obtain a voice in shaping the relief provided in the consent decree. Chayes, The Role of the Judge in Public Law Adjudication, 89 Harv. L. Rev. 1281, 1299 (1976).^{10/} Under the Commissioner's standard, moreover, the

^{10/} The inmates admit the importance of this factor in their brief at 28. See also Brief of United States at 11; Brief of Lawyers Committee for Civil Rights at 6; Brief of American Civil Liberties

(footnote continued)

parties also retain the most common incentives to settle any litigation, namely avoidance of the risks and costs of trial. Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L. J. 887, 898-899.

In public law litigation, public officials' incentives to settle cases will be increased by a flexible standard of modification. See Philadelphia

(footnote continued)

Union at 41; Brief of Center for Dispute Resolution at 6-13; Brief of Breed at 8-11; Brief of Tennessee at 23-24. See generally Brief of New York State (Second Circuit's flexible standard for modification of public law consent decrees has not decreased incentives for settlement, listing fourteen consent decrees entered after standard was adopted).

Welfare Rights Org. v. Shapp, 602 F.2d 1114, 1120 (3d Cir. 1979), cert. denied 444 U.S. 1026 (1980) ("An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation.")^{11/} If public officials know that they will not be bound in perpetuity to inflexible operational rules, specific budgetary outlays, and other concrete commitments, their incentives to settle will be greater. The flexible standard advocated by

^{11/} See also Brief of Tennessee at 24; Brief of New York State at 5; Brief of New York City at 35-36; Brief of United States at 12.

the Commissioner increases settlement incentives because it will allow public officials and their successors to adapt their actions to meet changing conditions within the confines of Rule 60(b).

B. The Commissioner's Standard
Does Not Undermine
Finality and Certainty.

The Commissioner's standard comports with the purposes of Fed. R. Civ. P. 60(b), and does not disturb the systemic interests in finality in litigation. Where equitable decrees restrict the operation of public institutions, it is vital that modification be granted when "it is no longer equitable that the [consent decree] should have prospective application." Fed. R. Civ. P. 60(b)(5). The Commissioner seeks to modify the terms of the consent decree

under this standard. He does not attack the original judgment in this case.^{12/}

In a case such as this, with continuous judicial supervision of an equitable decree, the public interest in finality associated with doctrines of issue preclusion is absent. Rule 60(b) makes it clear that continuing injunctions should be modified when appropriate circumstances are shown. In such cases, "[a] balance thus must be struck between the policies of res judicata and the right of the court to

^{12/} None of the cases the inmates cite in support of their argument on finality, Inmates' Brief at 23-24, involves an injunction. Two of the cases they cite are appeals from denials of habeas corpus and the third involves revocation of naturalization; the interests in finality in these contexts are much different than in a case involving a permanent injunction.

apply modified measures to changed circumstances." System Federation, 364 U.S. at 647-648. In this case, for example, the docket entries alone comprise 70 pages, and the "final" judgment appears on page 14. Eighteen years of docket entries follow that "final" judgment.^{13/} Principles of finality have less weight in public law litigation such as this precisely because there is continuing judicial supervision of the injunction to adapt to changing needs and circumstances.

^{13/} See also cases cited in Brief of Tennessee at 20; Fiss, The Forms of Justice, 93 Harv. L. Rev. 1, 27 (1979) ("The remedial phase in structural litigation . . . has a beginning, maybe a middle, but no end . . .").

III. THE INMATES' SUGGESTED STANDARD
FOR MODIFICATION IS IMPRACTICAL
AND INEQUITABLE.

- A. The Parties Appear to Agree
That The Swift Standard
Is Not Appropriate
for Public Law Cases.

The inmates appear to recognize that the standard for modification in United States v. Swift & Co., 286 U.S. 106 (1932) is not appropriate for public law litigation. Inmates' Brief at 34-54; Commissioner's Brief at 55-70; Sheriff's Brief at 31-37.^{14/} Although the inmates suggest that Swift articulates an acceptable standard for modification,

^{14/} Amici also propose alternatives to the Swift test. Brief of United States at 13-30; Brief of Tennessee at 22-29; Brief of New York City at 20-31; Brief of New York State at 2-4; Brief of Michael J. Ashe at 15-17; Brief of International City Management Assn. at 9-13; Brief of Inmates of Lorton at 6-8; Brief of American Civil Liberties Union at 22-38; Brief of Lawyers Committee for Civil Rights at 11.

they spend twenty-one pages of their brief proposing another standard and discussing its application to this case. Inmates' Brief at 34-54.

At a minimum, the inmates agree that modification should occur when there is a change in fact or law, when the modification is equitable, and when the modification is consistent with the purpose of the consent decree. Compare Inmates' Brief at 35-37 with Commissioner's Brief at 56, Sheriff's Brief at 32. Beyond these general points of agreement, however, the parties disagree substantially about other elements of the standard for modification.

B. The Inmates' Standard Is
Impractical and Would Harm
Important Public Interests.

The inmates' proposed standard

includes several elements that effectively treat the consent decree as a contract which cannot be breached. These elements include subjective assessments of the foreseeability of the changed circumstances, the good faith of the moving party, and the consideration that may have been exchanged by the parties in negotiations years earlier.^{15/} The inmates propose a rigid, complex assessment of a subjective nature which, like the Swift standard, is impractical and unreasonably burdens public officials.

The "flexible" standard for

^{15/} These subjective determinations are not an appropriate part of a uniform standard for modification, although in certain cases objective evidence relating to these factors appropriately may be weighed in the trial court's equitable determination of whether a modification should occur pursuant to Rule 60(b).

modification proposed by the Commissioner better serves the purposes of Rule 60(b) by requiring modification in cases such as this one, when the purposes of the decree have been fulfilled and the underlying constitutional wrong has been remedied and is not likely to recur. See Commissioner's Brief at 30-37. Apart from the situation where constitutional defects have been cured, the Commissioner maintains that modification is appropriate under Rule 60(b) when (1) there is a change in circumstances making application of the decree inefficient or inequitable; (2) the modification serves the public interest; and (3) the modification does not frustrate the purpose of the decree. Commissioner's Brief at 56.

This Court should reject the

subjective test of "foreseeability" suggested by the inmates. Inmates' Brief at 34.^{16/} This element of their standard would require proof of the parties' subjective states of mind at the time they signed the decree. This inquiry would be the source of endless litigation. Often, as in this case, those who actually negotiated the consent decree no longer are available. Moreover, evidence about what parties could "foresee" several years before, when the decree was signed, is likely to be conflicting and inconclusive.^{17/}

^{16/} See also Brief of Lawyers Committee for Civil Rights at 11; Brief of Inmates of Lorton at 15-16.

^{17/} Objective record evidence of foreseeability may be relevant to a court's objective review of whether "circumstances" have "changed" so as to warrant modification. In this regard, "foreseeability" as an objective factor already is part of the Commissioner's proposed "flexible" standard.

In this case, the inmates' test requires an assessment of the foreseeability of the twenty-five percent increase in average inmate population from 1985 to 1989. See J.A. 243. The inmates do not suggest, nor could they, any basis on which the Sheriff could have anticipated this escalation, governed by social forces and law enforcement policies over which he has no control. Neither do they explain why the inmates themselves could not have foreseen this increase and brought it to the Sheriff's attention.

In effect, the inmates argue only that the Sheriff should bear the entire risk of any increase in inmate population. Not only is there no explicit assignment of this risk to the Sheriff in the consent decree, it is

irrational to assume that the Sheriff agreed to such a one-sided proposition. By agreeing to the consent decree, the Sheriff obviously sought to provide a new jail adequate to house all those inmates committed to his custody, not to assume the burden of perpetually building additional jail cells to provide a single cell for each inmate.^{18/}

Similarly, it would be impractical and inequitable to assess the subjective "good faith" of the parties as a part of the standard for modification. See

^{18/} The context and language of the 1985 modification show that all parties believed that the jail then proposed would be adequate to house all Suffolk County pretrial detainees for the indefinite future. The inmates made their 1985 motion to modify the consent decree to allow a larger jail "[i]n view of the population figures . . ." J.A. 92.

Inmates' Brief at 35-36. The Court previously has avoided unwieldy and time-consuming inquiries into the subjective motivations of public actors. See Harlow v. Fitzgerald, 457 U.S. 800, 815-819 (1982) (eliminating subjective element of official immunity test); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct. 1344, 1351 (1991) (declining subjective inquiry into "official intent" for state action immunity from antitrust claims).

In this case, the inmates do not argue that the Sheriff acted in bad faith. They state only that the Sheriff "unreasonabl[y]" waited until after construction of the new jail began to seek modification of the decree.

Inmates' Brief at 44. This is not an allegation of bad faith, but only reiteration of the argument that the

Sheriff should have foreseen the increase in population. As with foreseeability, this Court should reject subjective good faith as part of a uniform standard for modification because the broad-ranging inquiries such an element would entail are "peculiarly disruptive of effective government." Harlow, 457 U.S. at 817.

Finally, the Court should reject the inmates' proposal that the trial court assess the concessions allegedly made by the parties before consenting to the decree, and determine whether modification is equitable in light of those concessions. Inmates' Brief at 36-37. This proposal suffers the same flaws as the subjective tests of

foreseeability and good faith.^{19/} It would require probing the mental processes of the parties to determine their thoughts and motives when the consent decree was signed. It would transform a ruling on a 60(b) motion into an effort to remake the parties alleged "agreement." See Firefighters v. Stotts, 467 U.S. at 574-575 (overruling district court's effort to carry out "purpose" of decree when text of decree contained no relevant term).

Under the inmates' proposal, Inmates' Brief at 44-45, this consent decree could never be modified because no modification could properly balance what the inmates say they have given

^{19/} In the rare case that the "tradeoff" is explicit on the face of the consent decree, it may be relevant to modification as an aid to the trial court's determination of the purpose of the decree.

up. The inmates admit as much, stating that "[t]here is no way to relieve the plaintiffs of the correlative burdens which they assumed under the decree."

Id. Nothing in Rule 60(b) or this Court's cases suggests such a slavish adherence to contract analysis. To the contrary, Rule 60(b) assumes that other factors must be weighed in assessing a request for modification, and does not even mention, let alone emphasize, contractual elements. Where public officials are parties to the consent decree, the contractual analysis is even less applicable.

CONCLUSION

For the reasons stated in this reply brief and in the Commissioner's initial brief, the Court should vacate the decision of the Court of Appeals and remand the case to that court with

instructions to direct the district
court to modify the consent decree as
requested by the Sheriff.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL
OF MASSACHUSETTS

John T. Montgomery
Jon Laramore
Douglas H. Wilkins*
Assistant Attorneys
General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

*Counsel of Record

DATED: June 28, 1991

(20) (20)
Nos. 90-954; 90-1004

Supreme Court, U.S.
FILED

JUN 28 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER
Robert C. Rufo

CHESTER A. JANIAK
Counsel of Record

THOMAS D. BURNS
PETER J. SCHNEIDER
ANN E. MERRYFIELD
WALTER M. FOSTER
BURNS & LEVINSON

125 Summer Street
Boston, Massachusetts 02110
(617) 345-3000

ROBERT C. RUFO
200 Nashua Street
Boston, Massachusetts 02114
(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County

TABLE OF CONTENTS

I. INTRODUCTION	1
II. RESPONDENTS FAIL TO ADDRESS THE ARGUMENT RAISED BY THE SHERIFF	1
III. RESPONDENTS AND THEIR <i>AMICI</i> HAVE PROPOSED STANDARDS FOR MODIFICATION OF CONSENT DECREES THAT ARE INAPPROPRIATE FOR INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE ADOPTED	4
A. The Respondents' Standard, Which Requires a Finding Of Changes "Unforeseen and Unforeseeable," Is Stricter Than The <i>Swift</i> Standard	4
B. Respondents' Standard Is Internally Inconsistent	5
C. Respondents' Standard Fails To Balance The Judicial Aspects Of A Consent Decree With Its Consensual Traits	7
D. Respondents' Standard Ignores Fundamental Principles Of Federalism	9
E. Respondents' Standard Would Increase Litigation	11
F. Respondents' Standard Is Inequitable	11
G. Respondents' Standard Eliminates The Incentive For Defendants To Settle	12
IV. RESPONDENTS RELY ON "FACTS" NOT FOUND BY THE DISTRICT COURT, UNSUPPORTED IN THE RECORD AND IRRELEVANT TO THE QUESTIONS PRESENTED .	14

TABLE OF CONTENTS (cont.)

A. The Sheriff's Proposal Was Not Fixed, And The Court Was Invited To Modify The Proposal In Light Of The Evidence And Its Findings To Provide A Modification That Would Permit Double-Bunking	14
B. The "Safety" Of The Inmates Will Be Preserved With Double-Bunking	15
C. Nearly All Of The Features Of The Design Of The Nashua Street Jail Are Unrelated To The Single Cell Requirement Of The Architectural Program	16
D. The Sheriff Seeks To Double-Bunk Only As Needed	16
E. The Respondents Alleged "Forebearance" .	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	3,6, 9,15,16
<i>Board of Education of Oklahoma City v. Dowell</i> , ____ U.S. ____, 111 S.Ct. 630 (1991)	3,10,14
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985) . .	6,7,9
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 561 (1984)	2,3

TABLE OF AUTHORITIES (cont.)

<i>General Talking Pictures Corp. v. Western Electric Co.</i> , 304 U.S. 175 (1938)	1n
<i>Heath v. DeCourcy</i> , 888 F.2d 1105 (6th Cir. 1989) .	5,6
<i>Local Number 93 v. City of Cleveland</i> , 478 U.S. 501 (1986)	2,3
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977) . . .	3
<i>New York State Association for Retarded Children, Inc. v. Carey</i> , 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983)	5,6, 8,10,16
<i>Newman v. Graddick</i> , 740 F.2d 1513 (11th Cir. 1984)	7
<i>Philadelphia Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3rd Cir. 1979), cert. denied, 444 U.S. 1026 (1980)	7,8, 10,13
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988) ("Plyler I")	5,6,7,8
<i>Plyler v. Evatt</i> , 924 F.2d 1321 (4th Cir. 1991) ("Plyler II")	8,10
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981) . . .	3
<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961)	9,12
<i>Theriault v. Smith</i> , 523 F.2d 601 (1st Cir. 1975) .	3n
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932) .	4,7,8
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	11
<i>Wolfish v. Levi</i> , 573 F.2d 118 (2d Cir. 1978) . .	9
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982) . . .	3,16

TABLE OF AUTHORITIES (cont.)***Statutes:***

1985 Mass. Acts ch. 799	19
-----------------------------------	----

I. INTRODUCTION

The issue presented in this case is what standard a federal district court should apply to requests to modify consent decrees that have been entered to reform jails, prisons and other public institutions. This issue arises in the context of what is often referred to as "institutional reform litigation." The unique features of institutional reform litigation differentiate it from other disputes in which a court enters a remedial order by either consent decree or injunction. (See Brief of Petitioner Sheriff Robert C. Rufo, "Sheriff's Br.", 15-18.) Any standard proposed for modifying consent decrees in institutional reform litigation must be flexible in order to recognize and accommodate these features. (See Sheriff's Br. 31-37.) Respondents and their *amici*, however, as shown below, do not address the standard proposed by the Sheriff, almost wholly ignore the context in which requests to modify institutional reform consent decrees are brought, and misstate what they assert are the facts of this case.

II. RESPONDENTS FAIL TO ADDRESS THE ARGUMENT RAISED BY THE SHERIFF.

Respondents, in their brief, formulate their own questions presented¹ and ignore the position taken by the Sheriff. Instead, they focus upon the position taken by Petitioner Thomas C. Rapone, Commissioner of Correction (the "Commissioner"). The Commissioner takes the position that if all constitutional violations in the operation of a public institution, such as a jail or prison, have been cured, a federal district court must grant a requested modification. (Brief of Commissioner, "Com'r. Br.", 30.)

¹ The questions presented by respondents do not resemble the questions upon which the Court granted *certiorari*. Had respondents wished to raise such issues they could have done so by cross-petition. Having failed to do so, however, they cannot now present questions which were not perfected below. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-79 (1938).

The Sheriff, in contrast, has proposed a standard, consistent with circuit court precedent, that allows a modification if there has been a significant adverse effect on a public official or on a particular public interest, and if the consent decree as modified will not derogate from the consent decree's purpose as defined by the federal law that brings the parties before the court. (Sheriff's Br. 32.) Under the Sheriff's standard, a moving party is not free to modify the consent decree at any time; a party must make a particularized showing of the need for the modification.

This Court has recently considered the scope of a district court's authority when entering or modifying a consent decree that is intended to vindicate federally secured rights. In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), this Court considered a consent decree that had been entered to vindicate the rights secured under Title VII of the Civil Rights Act of 1964. When the city defendant began laying off plaintiff minority firefighters under its seniority system, which favored white firefighters, the district court modified the consent decree to enjoin the layoffs. This Court held that the modification was improper, because a court may not add to a consent decree a provision it could not order after trial. *Id.* at 576 n.9, 579, 611 n.9 (Blackmun, J., dissenting). In *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986), also a Title VII case, this Court held that a court may enter (and presumably enforce) a consent decree that contains provisions that it could not order after trial.

Although both of these cases arose under Title VII, the reasoning in support of these holdings cannot be limited to that statute. The statutory scheme of Title VII functioned only to define the limits of a court's powers on the facts of the particular cases. There is no reason to suppose that the limits of a court's authority are different when the court sits, as in the present case, to vindicate rights secured under the Constitution. Indeed, it is precisely in the context of a federal court acting to vindicate such rights through orders entered against

state and local officials that this Court has repeatedly noted the limits on the court's authority. *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. 630, 637 (1991); *Youngberg v. Romeo*, 457 U.S. 307, 322 n.29 (1982) (citing *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)); *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). Also, there is no reason to treat a request to modify a consent decree by adding a provision, as in *Stotts*, differently than a request to modify a consent decree by removing a provision, as in the present case. Each implicates a court's equitable power to reform its own order in the context of the federal law the court sits to vindicate.

The Sheriff's proposed standard is in accord with and follows from this Court's holdings in *Stotts* and *Local 93*. The Sheriff's standard would allow the enforcement of a consent decree once agreed to and would limit a court's authority when modifying a consent decree to what the court could have ordered after trial. Thus, under the Sheriff's proposal, the purpose of a consent decree is defined by the law which the consent decree was entered to vindicate, and the modification is allowed if the decree as modified would not derogate from that purpose. To define the purpose otherwise would permit a court to enter orders that it could not after trial, contrary to this Court's holding in *Stotts*.

Respondents also mischaracterize the Sheriff's brief in claiming that the Sheriff argues that this Court's holding in *Bell v. Wolfish* mandates the modification requested here. (Brief of Respondents, "Resp. Br.", 44.) The Sheriff does not contend that the clarification of an inmates' constitutional rights enunciated in that case alone requires a modification.² However, *Bell* is relevant to a court's analysis of the Sheriff's proposed second criterion, since that case further defines the constitutional rights of inmates the court sits to vindicate.

² But see *Therault v. Smith*, 523 F.2d 601 (1st Cir. 1975), allowing a requested modification solely because a Supreme Court decision subsequent to signing of the consent decree clarified that the decree went farther than was required under federal statutory law.

III. RESPONDENTS AND THEIR AMICI HAVE PROPOSED STANDARDS FOR MODIFICATION OF CONSENT DECREES THAT ARE INAPPROPRIATE FOR INSTITUTIONAL REFORM LITIGATION AND SHOULD NOT BE ADOPTED.

Petitioners and their *amici* agree that a standard more flexible than the stringent standard enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932), should be adopted for modification requests in institutional reform litigation. Respondents and their *amici*, however, propose standards that are even more stringent than the *Swift* standard and would foreclose modification.

A. The Respondents' Standard, Which Requires a Finding Of Changes "Unforeseen and Unforeseeable," Is Stricter Than The *Swift* Standard.

In *Swift*, the Court required a showing that a change in circumstances be "unforeseen". Respondents' proposed standard, however, requires that a change not only be "unforeseen" but "unforeseeable" as well. (Resp. Br. 35.)³ Under respondents' standard, a court would not only have to determine what the parties took into consideration as a basis for their agreement at that time — in this case over ten years ago — but would also have to determine, with the assistance of hindsight, everything that could have possibly happened. The determination of whether something was "foreseeable" would be limited only by a court's imagination after the fact.

Courts, in considering modification requests in institutional reform litigation, have relied not on the "unforeseeability" of the changed circumstances, but on whether experience has proven the decree inefficient or harmful, regardless of whether the new circumstances could have been deemed "foreseeable"

³The respondents' third and fourth criteria, requiring a showing that the modification is "equitable in light of concessions" and that there is "no feasible alternative" to the requested modification (Resp. Br. 36-37), are likewise found nowhere in the stringent *Swift* standard for modification.

at the time of entry of the decree. *Heath v. DeCourcy*, 888 F.2d 1105, 1107, 1110 (6th Cir. 1989) (jail population foreseeably began increasing over expectations only one month after entry of decree, but modification was justified because experience proved decree ineffective); *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (modification should be allowed, not based on unforeseeability of conditions, but because experience has proven the decree ineffective). Nor have courts denied needed modifications because a defendant did not foresee the extent of a foreseen change. *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988) (even where defendant foresaw increase in prison population, but did not foresee that the increase would exceed predictions, court allowed modification). Indeed, even the District Court judge in the present case recognized that foreseeability should not be a part of a flexible standard. (Sheriff's Cert. Pet. 11a.)

Public institutions must adapt to continually changing conditions and conflicting demands. It is impractical for the parties to allow for every conceivable or "foreseeable" contingency in a consent decree. It is for these reasons that the law allows, and in this case the Consent Decree specifically provided for, modification. (Sheriff's Cert. Pet. 21a.)

B. Respondents' Standard Is Internally Inconsistent.

Respondents' second criterion requires that a defendant show both that a modification was timely requested and was requested in good faith. (Resp. Br. 35.) The standard also requires a showing that there are no "feasible alternative[s]." (Resp. Br. 37.) These requirements are mutually exclusive. On the one hand, respondents argue that a defendant must move to modify as soon as it knows of the need to modify; on the other hand, to show its "good faith", a defendant must demonstrate that it has attempted to comply with the terms of the decree in spite of the changes in circumstance and has no

feasible alternatives by which it can comply. Hence, a defendant is faced with a "Catch-22": if it moves as soon as it knows of the problem with compliance, it will not have had an opportunity to try to comply and thus demonstrate its good faith or lack of feasible alternatives; if it tries to comply and exhaust its remedies, it will not have acted "timely."

The circuit courts that have considered the modification issue have not relied on the "timeliness" of a motion in determining its adequacy, nor have they made "good faith" a prerequisite. Indeed, had timeliness and good faith been required, many of the courts could not have granted the requested modification. In *Plyler v. Evatt*, 846 F.2d at 211, where the prison population skyrocketed for two-and-a-half years before modification was requested, defendants' motion to modify would have been considered untimely under respondents' standard. Under the "good faith" standard, the court in *Carey* could not have granted the requested modification, because it found that the hardships requiring the modification were largely "self-imposed." *New York State Association for Retarded Citizens, Inc. v. Carey*, 706 F.2d at 966. And, had good faith been a criterion in *Duran v. Elrod*, 760 F.2d 756, 762 (7th Cir. 1985), the court there could not have granted the modification, since the court made findings tantamount to bad faith by the defendants. The court, however, granted the modification since denial would have only served to punish the public. *See also Heath v. DeCourcy*, 888 F.2d at 1107 n.2 (good faith not controlling in court's decision).

In this case, respondents claim that the Sheriff did not act "timely" because he did not move for modification immediately after *Bell v. Wolfish* was decided in 1979, or at least by 1985. (Resp. Br. 44.) On the other hand, they assert that the Sheriff should have waited until he had substantial evidence, after the jail was built, of specific instances of harm to the public, and that based on his experience in administering the new jail there was no alternative to double-bunking. (Resp. Br. 46-49.) The Sheriff could not do both.

C. Respondents' Standard Fails To Balance The Judicial Aspects Of A Consent Decree With Its Consensual Traits.

Respondents' argument and proposed standard place undue reliance upon the contractual aspect of consent decrees, ignoring the long line of precedent, beginning with this Court's decision in *Swift*, holding that contract principles do not apply to consent decrees, and ignoring the fundamental judicial nature of consent decrees. (Sheriff's Br. 21-22.) The respondents' third criterion, in particular, oversimplifies the nature of consent decrees as contracts to the extent that all judicial characteristics are absent. This criterion requires that a request for modification "must be equitable to the plaintiffs in light of the concessions made by them," so that if a defendant is relieved of a certain undertaking contained in a consent decree, then the plaintiff must be relieved of "its correlative undertaking." (Resp. Br. 36.) Respondents' attempts to apply rescission principles to motions to modify consent decrees are particularly inapt, since in institutional reform litigation interests that were not a party to the agreement may be adversely affected by its implementation. *Duran v. Elrod*, 760 F.2d at 760 (it is not possible to fit decrees involving many classes of persons into the "familiar framework of contract law," and in deciding modification of decree judge cannot appeal solely to the sanctity of contracts — he must consider impact on both parties as well as the public); *Plyler v. Evatt*, 846 F.2d at 212 (holding that "the district court clearly erred in assessing the degree of potential harm to the inmates as contrasted with the risks to the public").

The circuit courts that have considered requests for modification of consent decrees in institutional reform litigation have made no such quid pro quo analysis. See *Newman v. Graddick*, 740 F.2d 1513, 1521 (11th Cir. 1984) (court was to consider present prison conditions to determine extent to which they have been brought into alignment); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3rd Cir.

1979), *cert. denied*, 444 U.S. 1026 (1980) (court did not attempt to relieve plaintiffs of any correlative undertaking in lessening defendants' agreed-upon burdens); *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 970-971 (court adopted flexible standard for modification of consent decrees without requiring that plaintiff be relieved of a correlative undertaking).

Respondents mistakenly rely on *Plyler v. Evatt*, 924 F.2d 1321, 1324 (4th Cir. 1991) ("*Plyler II*"), in support of the proposition that plaintiffs must necessarily receive some benefit or relief from an obligation when a modification is granted to defendants. (Resp. Br. 36.) In fact, in neither *Plyler II*, nor in its previous decision in that case, reported at 846 F.2d 208 (1988) ("*Plyler I*"), did the Fourth Circuit impose any rigid contract principles when considering a modification of a consent decree, but adopted a more flexible approach. In *Plyler I*, the court reasoned, "[a]lthough double-celling will be contrary to a specific term of the consent decree, the prisoners have received the essence of their bargain." *Plyler I*, 846 F.2d at 212. That court reaffirmed this approach in *Plyler II* where it held that attention should not be confined to the indisputable fact that modification would necessarily abrogate a specific benefit conferred by the decree. *Plyler II*, 924 F.2d at 1327 (citing *Plyler I*, 846 F.2d at 212-13).

In addition, respondents blithely state that if desired, parties to a consent decree may agree that modification will be governed by a more flexible standard than the law customarily provides.⁴ (Resp. Br. 31.) This Court in *Swift* precluded such a proposition, stating that a federal court would "by force of principles inherent in the jurisdiction of the chancery," retain such powers, regardless of whether the parties had specifically provided for them in the decree. *United States v. Swift & Co.*, 286 U.S. at 114. Moreover, parties cannot unilaterally decide

⁴Of course, given the range of "flexible" standards articulated by the circuit courts, along with the adherence to a stringent standard below, it is unclear what standard of modification the law now "customarily" provides.

that a more strict or more flexible standard for modification should apply. To do so would be to rob a court of its inherent equitable powers by permitting the parties to expand or contract its jurisdiction. "The parties [to a consent decree] cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961).

D. Respondents' Standard Ignores Fundamental Principles Of Federalism.

Respondents' fourth criterion requires a defendant to show that there is "no feasible alternative to the proposed modification which preserves the original relief." (Resp. Br. 37.) Under this criterion, a public official who is faced with two different alternatives for adapting to a changed condition — one of which does not modify the consent decree and the other requiring a modification — must choose the former, even if it is more burdensome, less efficient, less effective and more costly than the latter, and even if it fails to adequately protect the public interest. Hence, under respondents' proposed standard, a consent decree becomes an agreement by which public officials forever relinquish all discretion to choose what, out of a range of alternatives, is the best means to adapt to changed circumstances. This position is contrary to the decisions of this Court and to the decisions of the circuit courts that have considered the modification issue.

This Court has recognized that jail and prison administrators in particular "should be accorded wide-ranging deference in the adoption and execution of policies and practices" and that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our government, not the Judicial." *Bell v. Wolfish*, 441 U.S. at 547, 548 (citations omitted). The Court further held that "it would 'not [be] wise for [it] to second-guess the expert administrators on matters on which they are better informed'." *Id.* at 531 (*quoting Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978)); accord *Duran v. Elrod*, 760 F.2d at 759.

This principle of deference to the professional and autonomous judgment of public officials does not end when a court enters an injunctive decree against them requiring that they bring their institutions into compliance with constitutional standards. *Board of Education of Oklahoma City v. Dowell*, — U.S. —, 111 S.Ct at 637. Neither should a consent decree preclude officials from exercising autonomous professional discretion over the means by which they will adapt to changing circumstances. The court in *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 971, specifically rejected the argument that “defendants irrevocably exercised their professional judgment when they agreed” to the consent decree there, reasoning that “defendants’ agreement was premised on their belief, now shown to have been untenable,” that they could comply with the terms of the decree within a reasonable time.

No case cited by petitioners or respondents stands for the proposition that there must be no feasible alternative to the proposed modification which preserves the original relief. *Plyler v. Evatt*, 924 F.2d at 1328, cited by respondents in support of this proposition, provides only that a district court may determine appropriate equitable relief necessitated by a changed circumstance; nowhere does that court hold that the relief requested must be the least drastic alternative available. Likewise, *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1121, cited as support for this proposition by respondents, emphasizes the need for flexibility in adapting to changed circumstances, and says nothing about limiting changes to what plaintiffs deem the least drastic.

The respondents and their *amici*, in arguing for the preservation of the incentive to enter into consent decrees, improperly elevate the value of finality of consent decrees over all other considerations. Consent decrees may be convenient for the court and may be a practical means for the parties to settle rather than litigate their dispute. However, the practical considerations cannot outweigh, as the respondents and *amici* would

have it all other considerations. To so weigh the value of finality in the context of consent decrees is to reduce to insignificance the protection a court may give to the public interest and to deprive a court of its inherent equitable power to reform its own order when it produces a harmful or inequitable result.

E. Respondents' Standard Would Increase Litigation.

Respondents' first criterion requires that a change in circumstances be both unforeseen and unforeseeable, and the third criterion requires defendants to show that a proposed modification is "equitable" in light of the concessions plaintiffs have made in entering the consent decree. The first criterion imposes on the court the burden of determining what the parties actually considered as possible changes in circumstance and what they reasonably should have considered given the information available to them. The third criterion imposes on the court the burden of recreating each party's negotiating positions to determine what was the "correlative undertaking" by plaintiff for each obligation assumed by a defendant. Such an exercise in *ex post facto* reconstruction is time-consuming and costly and is likely to lead to inconsistent results.

F. Respondents' Standard Is Inequitable.

The five criteria that respondents would have this Court adopt, ironically, only apply to an institutional *defendant* seeking a modification. (Resp. Br. 34 n.18.)⁵ Relying on the Court's decision in *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), respondents suggest that plaintiffs in institutional reform litigation need not be concerned by the foreseeability of changes or by the contractual aspects of the consent decrees. Rather, plaintiffs are entitled to a modification as long as it is needed to achieve the purpose of the decree,

⁵ Similarly, *Amicus* the United States proposes a different standard for state and local government defendants when the United States is the plaintiff than when the United States is a defendant. (Brief of *Amicus* the United States, 28 n.17.)

regardless of whether the circumstance preventing achievement of the decree was "foreseeable", and regardless of whether the defendants conceded anything to arrive at the particular agreement.

This double standard proposed by respondents is inequitable to institutional defendants and should not be adopted. The standard proposed by the Sheriff, on the other hand, treats plaintiffs and defendants equitably. It allows plaintiffs a modification if additional relief is needed to vindicate a federally secured right or if a change in law affords them additional rights. *System Federation No. 91 v. Wright*, 364 U.S. at 648-50. It allows defendants a modification if the decree has an adverse impact on their ability to operate the institution or on a particularized public interest. (Sheriff's Br. 37.) In brief, the standards proposed by the respondents and their *amici* would permit a plaintiff to obtain a modification of a consent decree while either denying that opportunity to the public official defendant or foreclosing such modification as a practical matter.⁶

G. Respondents' Standard Eliminates The Incentive For Defendants To Settle.

The parties agree that any standard adopted by this Court for modification of consent decrees should preserve the incentive to settle institutional reform litigation. (Resp. Br. 27-28, Sheriff's Br. 36.) Respondents and their *amici*, however, over-

⁶*Amicus* ACLU proposes a standard that would permit a modification, but only if "the modification is necessary to achieving the goal of the decree." (*Amicus* ACLU Br. 35.) This permits a modification which favors plaintiffs, but provides no mechanism for a modification requested by a defendant, even if the change would avoid a significant adverse effect on the public interest and leave the plaintiffs with their rights fully vindicated.

Amici Inmates of the Lorton Central Facility, like the ACLU, propose a standard which would allow a permanent modification if needed to achieve the consent decree's purpose (Brief of *Amici* Inmates of the Lorton Central Facility, 17), but allow only a temporary change if "enforcement [of the consent decree] would demonstrably harm the public welfare." (*Id.* at 24.)

emphasize the finality of the decree as the ultimate incentive to settle. (Resp. Br. 41.) Any standard that elevates finality over flexibility will, ironically, discourage settlement because defendants will not choose to forfeit their ability to later request needed changes:

An approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation. That wariness would, we think, tend to discourage the settlement of injunction actions by consent decree, a high price to pay for the benefits of finality.

Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d at 1120.

Moreover, the criteria of respondents' standard are virtually impossible to meet, would preclude modification and, therefore, would discourage defendants from entering into consent decrees. The requirement that defendants demonstrate that a change be "unforeseeable" is an impossible burden since all changes are foreseeable in hindsight. (See discussion at 4-5, *supra*.) Also, the requirements that a modification request be both timely and in good faith are mutually exclusive, and again, a defendant could not meet that burden. (See discussion at 5-6, *supra*.) Similarly, the third criterion, requiring a rescission-type of analysis, would be impossible to meet, since after many years of litigation and many additional years of compliance, the parties simply cannot be put back into their previous positions. (See discussion at 7-9, *supra*.) Finally, it would be virtually impossible for a defendant to show that there is no "feasible alternative" to the relief requested. In this case, for example, the release of prisoners is always an alternative — albeit an undesirable alternative that is harmful to the public interest and safety — to double-bunking. Similarly, plaintiffs

could always argue that any problem in meeting the demand for more jail space can be solved "simply" by spending more money on the problem.

In contrast, an institutional defendant that has had an injunctive decree entered against it by a court rather than by consent need only show that it has acted in compliance with the injunction for a reasonable period of time and that it does not intend to return to its former ways in order to have the injunction dissolved. *Board of Education of Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. at 637. A defendant, faced with the choice of either forever surrendering its ability to adapt to changed circumstances through the immediate "certainty" of a consent decree or accepting what the court may order within its constitutional limitations, will choose the latter since an order may be modified as circumstances change.

IV. RESPONDENTS RELY ON "FACTS" NOT FOUND BY THE DISTRICT COURT, UNSUPPORTED IN THE RECORD AND IRRELEVANT TO THE QUESTIONS PRESENTED.

A. The Sheriff's Proposal Was Not Fixed, And The Court Was Invited To Modify The Proposal In Light Of The Evidence And Its Findings To Provide A Modification That Would Permit Double-Bunking.

The respondents and their *amici* have asserted two reasons that allegedly render the Sheriff's double-bunking proposal unconstitutional.

First, they have pointed to the design of the cell doors as restricting the vision of a jail officer standing away from the door. However, if the court concluded that an increased viewing area were needed, the design of the door could be modified to provide an increased viewing area and that requirement made part of an order allowing the modification.

Second, they argue that under the Sheriff's proposal inmates would be out of their cells twelve hours per day, while at the

pretrial facility that was the subject of this Court's decision in *Bell v. Wolfish*, inmates were out of their cells sixteen hours per day. Again, the number of hours of out-of-cell time was subject to increase, if the District Court determined that it was necessary to permit double-bunking. (F.C.R.A. 96.)

The respondents and their *amici* have not pointed to a single provision of the Sheriff's proposal (other than cell size) that could not be adjusted, if need be, to provide a double-bunking plan that is acceptable.

B. The "Safety" Of The Inmates Will Be Preserved With Double-Bunking.

The respondents and their *amici* repeatedly argue that double-bunking at the new Suffolk County Jail at Nashua Street would pose an unconstitutional risk of harm to inmates from other inmates. In so asserting, the respondents and their *amici* simply ignore the overwhelming evidence in the record to the contrary. (J.A. 114-145, 191-216, 239-241; F.C.R.A. 679-824, 989-1034.) Instead, they recite the conclusion in the affidavit of their expert, a former Sheriff of Middlesex County, Massachusetts, who, contrary to common sense and the facts, describes the cells at the Nashua Street Jail as "hermetically sealed",⁷ while pointing to not a single specific incident of violence between cellmates in his experience as a Sheriff. (The only specific incident respondents do point to occurred at the old Suffolk County Jail at Charles Street eighteen years ago under completely different circumstances. (F.C.R.A. 770-777.)) In fact, experience demonstrates that inmates may be safely double-bunked on a routine basis. (J.A. 114-145, 191-216; F.C.R.A. 679-824, 989-1034.) The evidence before the Court presents a clash of professional judgments. Such differences in professional judgments cannot be resolved by a court choosing between them. Rather, a court must defer to the judg-

⁷ Respondents claim that a jail officer would be unable to hear "altercations" taking place in a locked cell. (Resp. Br. 16.) This is not true. (F.C.R.A. 784-797.)

ment of the government officials. *Youngberg v. Romeo*, 457 U.S. at 322; *New York State Association for Retarded Children, Inc. v. Carey*, 706 F.2d at 971; *Bell v. Wolfish*, 441 U.S. at 547-48.

C. Nearly All Of The Features Of The Design Of The Nashua Street Jail Are Unrelated To The Single Cell Requirement Of The Architectural Program.

Respondents and their *amici* assert that single-celling was the "linchpin" of the design of the new jail at Nashua Street. (Resp. Br. 42.) This is simply false. Nearly all of the facilities provided for in the Architectural Program are unrelated to whether cells are single or double-bunked: six outdoor recreation decks, large indoor gymnasium with weight lifting and exercise equipment, chapel, infirmary, law library, general library, classrooms, contact visiting area, noncontact visiting rooms and attorney/client and case worker interview rooms. Even the specifics of cell design are not peculiar to or determinative of single-celling. Each cell at Nashua Street is at least seventy square feet, only five square feet less than what this Court found acceptable for double-bunking in *Bell v. Wolfish*, 441 U.S. at 541, and the design of the cell door is either adequate for double-bunking as is (J.A. 202-203), or the door can be modified to provide an increased viewing area.

The Nashua Street Jail was not designed so as to safely accommodate only 453 inmates, the number of cells at the jail. In fact, the jail has the physical capacity to safely house at least 650 inmates as has been determined under American Correctional Association ("ACA") standards and the state building code.⁴

D. The Sheriff Seeks To Double-Bunk Only As Needed.

Respondents have asserted that factual circumstances have changed such that double-bunking may no longer be required,

⁴ The State Building Code Appeals Board has determined that the jail can safely house 650 inmates (J.A. 239-241), as did the mock ACA audit conducted before the jail opened. (F.C.R.A. 989-1034.) Also, with 650 inmates, the jail would meet the ACA standard for common out-of-cell area per inmate.

and that once the number of male inmates committed to the Sheriff's custody exceeded the number of cells available to house them the Sheriff would automatically double-bunk all of the remaining inmates. (Resp. Br. 46-47.) Both of these assertions are inaccurate.

The number of male inmates committed to the Sheriff's custody (as is true of all jail and prison populations) fluctuates over time. This fluctuation depends upon a variety of short-term and long-term factors beyond the Sheriff's control, including the season of the year, the intensity of police efforts and the resources available to the police and prosecutors. Although the need to double-bunk may not be constant, the Sheriff seeks to have the option of double-bunking when the male population fluctuates above the number of cells available, rather than dealing with that excess number by interfering with operation of the state bail statute and state and county correctional systems as has been done until now.⁹

Also, contrary to the respondents' assertion, the Sheriff has proposed to double-bunk inmates committed to his custody only after it has been determined that they are suitable for double-bunking under the Suffolk County Jail Classification Program. (J.A. 203-206; F.C.R.A. 762-769.) If given the option to double-bunk up to 197 cells, the Sheriff would have available 200 other cells to hold male inmates.¹⁰ This would give the Sheriff the ability to hold inmates in the type of setting — single-celled or double-bunked — that is correctionally appropriate. If the extraordinary circumstance should occur where all the available cells have been filled and there are no inmates who are suitable for double-bunking, the Sheriff would

⁹ As set forth in detail in the Sheriff's Brief at 5-6, one of the means for dealing with over-population at the jail is to transfer inmates out of the county, which is costly, inefficient and serves no useful purpose. If granted the requested modification, the Sheriff will discontinue these transfers. However, regardless of the daily headcount, the Sheriff will continue to vigorously prosecute bail appeals under the Bail Appeal Project.

¹⁰ In addition, there are 22 infirmary cells for male inmates that would continue to be single-celled.

have to find accommodation for those inmates elsewhere in the county or state correctional systems. This option contrasts sharply with the Sheriff's present inability to double-bunk any inmates even though they may be easily and safely double-bunked.

E. The Respondents Alleged "Forebearance".

Respondents and their *amici* assert that there have been "seventeen years" of "forebearance" while they waited for a new jail to be built and opened, and that they should not now, having provided that "consideration", be deprived of the single-celling consideration they received in return. (Resp. Br. 42.) This is a misstatement of the law, the facts and the relationship among the Sheriff, the inmates and the other defendants.

First, this inaccurately describes the Consent Decree as a purely private contract comprised of a sequence of *quid pro quo* exchanges of consideration. (See discussion at 7-9, *supra*.)

Second, the Sheriff has never had control over the funding for or the timing of the construction of a new jail, which has always been in the exclusive control of the Mayor and the City Council. The respondents and their *amici* assert, however, that a delay, not of the Sheriff's own creation, in construction of the new jail should be weighed against him.

Third, and most importantly, the respondents, as the party that obtained the consent decree ordering the construction of a new jail, had the right to seek compliance from the Mayor and City Council through an action for contempt. The respondents, therefore, had much greater control over the timing of the construction of the new jail than the Sheriff. The Consent Decree provided a strict schedule for the construction of a new Suffolk County Jail, providing that contracts be awarded within eighty-six weeks of the signing of the Consent Decree in April, 1979. (Sheriff's Cert. Pet. 20a-21a.) Construction should, therefore, have begun in early 1981. No contracts were awarded and construction did not begin in 1981. Finally, in

October, 1984, exasperated by the inability of the respondents and the Mayor and City Council to get a new jail built, the Sheriff brought suit in state court under state law to compel the Mayor and the City Council to build a new Suffolk County Jail. The Sheriff successfully pursued this litigation before a Single Justice of the Massachusetts Supreme Judicial Court and on appeal before its full bench. As a result of the Sheriff's successful initiation and pursuit of this litigation, the state legislature provided the funds to construct a new Suffolk County Jail. *See* 1985 Mass. Acts ch. 799. It was this funding, \$54,000,000, and not the \$15,000,000 provided for by the City of Boston under the Consent Decree, that funded construction.

On these facts it is misleading and unfair for the respondents to speak of their "forebearance" and to attempt to portray the Sheriff as a foot-dragging defendant.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Brief of Petitioners, the decision below should be reversed and an order entered directing the allowance of the Sheriff's motion to modify the Consent Decree.

Respectfully submitted,

CHESTER A. JANIAK
Counsel of Record

THOMAS D. BURNS

PETER J. SCHNEIDER

ANN E. MERRYFIELD

WALTER M. FOSTER

BURNS & LEVINSON

125 Summer Street

Boston, Massachusetts 02110

(617) 345-3000

ROBERT C. RUFO

200 Nashua Street

Boston, Massachusetts 02114

(617) 725-4009

Counsel for Petitioner Sheriff of Suffolk County

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY,
ET AL., PETITIONERS

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

GEORGE C. VOSE, COMMISSIONER OF CORRECTION,
PETITIONER

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
THOMAS M. BONDY
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTION PRESENTED

The United States will address the following question:

What is the appropriate standard for determining whether a sufficient showing has been made to warrant the modification of a consent decree specifying in detail measures to be taken to correct pre-existing unconstitutional conditions of confinement in a local penal institution?

2

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
I. The character and utility of consent decrees	9
II. The <i>Swift</i> standard—requiring a “clear showing of grievous wrong”—is inappropriate in the context of this case	13
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Alliance To End Repression v. Chicago</i> , 742 F.2d 1007 (7th Cir. 1984)	12, 17, 23, 26
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	4, 27
<i>Board of Education v. Dowell</i> , 111 S. Ct. 630 (1991)	16, 18, 26, 27
<i>Chrysler Corp. v. United States</i> , 316 U.S. 556 (1942)	16, 22, 23
<i>Citizens For A Better Environment v. Gorsuch</i> , 718 F.2d 1117 (D.C. Cir. 1983), cert. denied, 467 U.S. 1219 (1984)	26
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985)	12, 24, 27
<i>Firefighters Local Union 1784 v. Stotts</i> , 467 U.S. 561 (1984)	21, 22
<i>Heath v. De Courey</i> , 888 F.2d 1105 (6th Cir. 1989)	17, 24, 25
<i>Hodge v. Department of Housing & Urban Development</i> , 862 F.2d 859 (11th Cir. 1989)	17
<i>Inmates of the Suffolk County Jail v. Kearney</i> :	
573 F.2d 98 (1st Cir. 1978)	3
No. 90-1858 (1st Cir. Mar. 21, 1991)	14
<i>Kemper v. Board of Election Commissioners</i> , 814 F.2d 332 (7th Cir. 1987)	25
<i>Kozlowski v. Coughlin</i> , 871 F.2d 241 (2d Cir. 1989)	11

IV

Cases—Continued:

Page

<i>Local 93, Int'l Ass'n of Firefighters v. Cleveland</i> , 478 U.S. 501 (1986)	9, 10, 11, 20, 21, 24
<i>National Audubon Society v. Watt</i> , 678 F.2d 299 (D.C. Cir. 1982)	26
<i>Newman v. Graddick</i> , 740 F.2d 1513 (11th Cir. 1984)	25
<i>New York State Association For Retarded Chil- dren v. Carey</i> , 706 F.2d 956 (2d Cir.), cert. de- nied, 464 U.S. 915 (1983)	16, 17, 18, 19, 21, 23, 25
<i>Philadelphia Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3d Cir. 1979), cert. de- nied, 444 U.S. 1026 (1980)	12, 16, 17, 19, 22, 23, 25
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir.), cert. de- nied, 488 U.S. 897 (1988)	16, 19, 24, 25
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973)	27, 28
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	24, 27
<i>Ruiz v. Lyngaugh</i> , 811 F.2d 856 (5th Cir. 1987)	17, 19, 22, 25, 29
<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961)	10, 12, 16, 19, 20, 24
<i>The Money Store, Inc. v. Harris Corp Finance, Inc.</i> , 885 F.2d 369 (7th Cir. 1989)	12, 26
<i>Theriault v. Smith</i> , 523 F.2d 601 (1st Cir. 1975)	20
<i>Thornburgh v. Abbott</i> , 490 U.S. 401 (1989)	27
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	27, 28
<i>Twelve John Does v. District of Columbia</i> , 861 F.2d 295 (D.C. Cir. 1988)	22
<i>United States v. Armour & Co.</i> , 402 U.S. 673 (1971)	9, 11, 22
<i>United States v. County of Nassau</i> , 773 F. Supp. 563 (E.D.N.Y.), aff'd, 907 F.2d 397 (2d Cir. 1990)	28
<i>United States v. ITT Continental Baking</i> , 420 U.S. 223 (1975)	9, 10
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	15, 22
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932)	5, 9, 10, 13, 14, 15
<i>United States v. Wheeling-Pittsburgh Steel Corp.</i> , 818 F.2d 1077 (3d Cir. 1987)	23

Constitution, statutes, and rule:	Page
U.S. Const.:	
Art. VI, § 2 (Supremacy Clause)	28
Amend. XIV (Due Process Clause)	2
Civil Rights of Institutionalized Persons Act, 42	
U.S.C. 1997 <i>et seq.</i>	1
Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i>	28
Ocean Dumping Act, 33 U.S.C. 1401 <i>et seq.</i>	28
Railway Labor Act, 45 U.S.C. 151 <i>et seq.</i>	19, 20
42 U.S.C. 9622 (f) (6)	23
Fed. R. Civ. P. 60(b)	11
Miscellaneous:	
Chayes, <i>Foreword: Public Law Litigation And</i> <i>The Burger Court</i> , 96 Harv. L. Rev. 4 (1982)	18
Note, <i>The Modification Of Consent Decrees In In-</i> <i>stitutional Reform Litigation</i> , 99 Harv. L. Rev. 1020 (1986)	17

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-954

ROBERT C. RUFO, SHERIFF OF SUFFOLK COUNTY,
ET AL., PETITIONERS

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

No. 90-1004

GEORGE C. VOSE, COMMISSIONER OF CORRECTION,
PETITIONER

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, the Attorney General is responsible for protecting the civil rights of persons institutionalized in state and municipal facilities; by

virtue of its role as operator of the federal prison system, the United States may be the defendant in prison reform litigation. Moreover, most federal pre-trial detainees are housed in state or local facilities. Thus, the United States has a strong interest in the development of appropriate standards for the modification of consent decrees terminating prison reform litigation. And, in carrying out its wide-ranging operational and enforcement responsibilities under federal law, the federal government may enter into consent decrees to resolve litigation in which it is either a plaintiff seeking enforcement of constitutional or federal statutory requirements or a defendant charged with violating such requirements. If the standards articulated in this case apply beyond the prison reform context, the case could thus implicate the interests of the United States in a variety of situations.

STATEMENT

1. In this class action, inmates at the Suffolk County Jail in Boston, Massachusetts, brought suit against the Sheriff of Suffolk County and others, challenging the conditions of confinement for pretrial detainees at the jail. In June 1973, the federal district court ruled that those conditions violated the Due Process Clause of the Fourteenth Amendment. *Pet. App.* 23a-54a.¹

The court found that the jail (which had been in continuous use since about 1848) was antiquated and posed a serious fire hazard; that the facility's plumbing system did not work properly; that there were rats and insects in the facility; and that the cells in which inmates were confined for almost twenty hours

¹ "Pet. App." references are to the petition in No. 90-954.

per day were small, dirty, hazardous to the health of the inmates, and subject to extremes in temperature. The court also noted that inmates were often housed two per cell in cells originally designed for single occupancy, and that inmates were double-celled without identifying those who could not safely be so housed. Pet. App. 25a-35a. The court concluded that these conditions, in sum, amounted to unconstitutional punishment of inmates who had not been convicted of a crime and were incarcerated awaiting trial. *Id.* at 40a. To remedy these unconstitutional conditions, the court ordered that no pretrial detainees be housed at the jail after June 30, 1976. *Id.* at 48a.² This deadline was extended on several occasions. *Id.* at 6a-7a.

After further litigation, see *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d 98 (1st Cir. 1978), and lengthy negotiations concerning whether (and when) the defendants would be required to close the jail completely, final remedial relief was entered in May 1979 in a consent decree that provided for the construction of a new jail. Pet. App. 15a-22a.³ The consent decree incorporated by reference a comprehensive architectural plan describing in detail various features of the new jail. *Id.* at 16a; see C.A. App. 181-290 (architectural plan).⁴

² The court also ordered that pretrial detainees at the jail not be double-celled after November 30, 1973. Pet. App. 48a.

³ Construction of the new facility began in 1987, and was completed in 1990.

⁴ These features included modular housing units (C.A. App. 236), each with its own kitchenette and recreation area (*id.* at 238), inmate laundry rooms (*id.* at 244), education units (*id.* at 250), and indoor and outdoor exercise areas (*id.* at 256, 260). See also J.A. 136 ("All areas within the new jail are climate controlled.").

The plan provided for single occupancy cells (C.A. App. 236); the jail was to contain a total of 309 such cells. Pet. App. 7a. The number of cells was based on projections predicting a decline in the prison population. C.A. App. 189. By 1985, however, “[t]he parties realized that the projections of the detainee population on which the original plans were based were flawed, and that a jail with a larger capacity would be needed.” Pet. App. 7a-8a. Plaintiffs, with the defendants’ consent, moved to modify the architectural plan contained in the consent decree to provide for 435 cells. C.A. App. 354. The district court granted the requested modification, citing “the unanticipated increase in jail population.” Order of April 11, 1985 (J.A. 110). The district court’s order states that “single-cell occupancy [must be] maintained.” J.A. 111; see Pet. App. 8a. The design of the new jail was later further changed to contain 453 cells. 90-954 Pet. 5.

2. On July 17, 1989, petitioner Rufo, the Sheriff of Suffolk County, filed a motion in district court seeking modification of the consent decree to permit double occupancy in 200 of the new jail’s 282 “regular male housing cells.” J.A. 246. The Sheriff asserted that double-celling was required because of continuing increases in the Suffolk County pretrial detainee population. The Sheriff’s proposal contemplated that no inmate would be double-celled unless found fit to share a cell with another inmate, and “[d]ouble-celled pretrial detainees would be out of their cells for 12 hours per day.” J.A. 143. Relying on this Court’s decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that double-celling of pretrial detainees is not *per se* unconstitutional), the Sheriff contended that in light of the state-of-the-art nature

of the new facility, double-celling of pretrial detainees in that facility could not be considered unconstitutional. J.A. 209; see also Pet. App. 12a.

The district court denied the Sheriff's motion for modification. Pet. App. 5a-14a. Quoting this Court's decision in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), the court stated that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Pet. App. 8a. The court determined that, under this standard, there was no change in the pertinent legal framework or factual circumstances that warranted modification.

The district court first rejected the Sheriff's contention that this Court's decision in *Bell v. Wolfish*, *supra*, represented a change in the law justifying deviation from a single occupancy requirement. Pet. App. 8a-10a. It noted that although *Bell* held that double-celling of pretrial detainees was not *per se* unconstitutional, it "did not directly overrule any legal interpretation on which the 1979 consent decree was based." *Id.* at 10a. The court also rejected the contention that increases in the pretrial detainee population constituted a changed factual condition that warranted modification of the consent decree's single occupancy requirement. The court recognized that "increases in jail populations are difficult to predict and are beyond the control of the Sheriff" (*id.* at 11a), but observed that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen. It has been an ongoing problem during the course of this litigation, both before and after entry of the consent decree" (*id.* at 10a).

After rejecting the motion for modification under the *Swift* standard, the district court acknowledged

that some courts of appeals have applied a less stringent standard to requests, like this one, for modification of consent decrees in institutional reform litigation. Pet. App. 11a. The district court noted that, “[u]nder this standard, a court may grant a modification if a defendant establishes that some change in circumstances has occurred from the time the decree was negotiated and approved and that the defendant has attempted to comply with the decree in good faith, and if the modification requested does not frustrate the original overall purposes of the decree.” *Ibid.* The court stated, however, that the requested modification would not be appropriate even under this alternative test. *Id.* at 11a-12a.

The court reasoned that “[t]he proposed modification would violate one of the primary purposes of the decree—to provide conditions of confinement for Suffolk County pretrial detainees that meet agreed-upon standards.” Pet. App. 12a. According to the court, “[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element.” *Ibid.* Thus, “[t]he type of modification sought here would not comply with the overall purpose of the consent decree; it would set aside the obligations of that decree.” *Ibid.*

Finally, the district court rejected the argument that modification of the consent decree’s single occupancy rule was warranted because petitioner’s double-celling proposal was assertedly in full compliance with constitutional requirements. The court explained that “[d]efendants’ agreement in this case was a firm one, and not merely an agreement to comply with the decree * * * until it arguably required more of the defendants than the absolute minimum

they would be constitutionally required to provide.” Pet. App. 12a-13a. The court also rejected the argument that modification was appropriate because adherence to a single-celling requirement might result in the release of some pretrial detainees. *Id.* at 13a.

3. In a brief, *per curiam* opinion, the court of appeals affirmed, stating that “[w]e are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further.” Pet. App. 2a.

SUMMARY OF ARGUMENT

1. A consent decree, like a contract, is the result of the agreement of the parties. At the same time, like any judicial decree, it constitutes a judicial act. As an agreement—a settlement of a dispute that has reached the stage of litigation—it serves the important purposes of reducing the risk and cost of litigation, of conserving scarce judicial resources, and of facilitating a resolution that may be more acceptable to both parties than one imposed from without. But as a judicial decree, which involves the court itself in continuing supervision, it must be subject to modification, even without the consent of all parties, if enforcement of the decree as originally entered would be inequitable and would not serve the public interest.

The appropriate standard for modifying a consent decree, over the objection of one of the parties, should strike the proper balance between these two aspects of such a decree. This standard, in our view, varies with the nature of the decree and the underlying controversy. In the context of institutional reform litigation such as this, we believe that, while consent decrees perform a valuable function and should not be subject to modification without a sufficient show-

ing of need, substantial weight should be given to the judicial aspect of the decree.

2. The district court in this case relied heavily, and in our view incorrectly, on this Court's statement in *Swift* that only a "grievous wrong evoked by new and unforeseen conditions" would warrant modification of a consent decree over a party's opposition. That language was not intended as a universally applicable test; indeed its limited applicability was made clear in *Swift* itself and in a number of subsequent decisions of this Court.

Unlike *Swift*, the consent decree in this case is designed to change the nature and operation of a public institution in order to bring it into compliance with constitutional standards, and modification of the decree is sought by the public institution, not by a private party. In these circumstances, involving not simply prohibitory provisions but affirmative obligations requiring significant public expenditures, a less stringent standard than that applied in *Swift* is appropriate. Such a standard should take into account significant changes in the constitutional landscape against which the original decree was crafted, as well as significant changes in the relevant factual conditions. Thus, modification may be warranted if such changes have made compliance significantly more difficult, despite good faith efforts, and if the requested modification would not thwart a central purpose of the decree.

The need for a more flexible standard in the institutional reform context is underscored by two additional factors. First, when such a decree is entered against a public institution, the impact of the decree on the public interest, indeed its direct impact on persons not parties to the decree, is likely to be

greater than in the case of a consent decree between private parties, or against a private defendant. Second, the role of the federal court as supervisor and enforcer of a decree against a public institution is likely to raise important questions of federalism, of separation of powers, or both. Such questions militate in favor of greater flexibility than may be appropriate in a less sensitive context.

In view of the consideration given to the *Swift* standard by the lower courts in this case, and the difficulty of ascertaining how much reliance was placed on that standard in rejecting the requested modification, we believe the case should be remanded to the court of appeals for consideration of the request in light of this Court's decision.

ARGUMENT

I. THE CHARACTER AND UTILITY OF CONSENT DECREES

A. A consent decree is a court order that embodies the terms of an agreement by the parties disposing of litigation. It has attributes of both contracts and judicial decrees. On the one hand, consent decrees resemble contracts "because their terms are arrived at through mutual agreement of the parties." *Local 93, Int'l Ass'n of Firefighters v. Cleveland (Firefighters)*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking*, 420 U.S. 223, 236 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). On the other hand, "they are motivated by threatened or pending litigation and must be approved by the court" (*ITT Continental Baking*, 420 U.S. at 236 n.10). Thus, a consent decree is a "judicial act." *Swift*, 286 U.S. at 115. Accordingly, "consent decrees bear some of the earmarks of judgments

entered after litigation.” *Firefighters*, 478 U.S. at 519.

“Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.” *ITT Continental Baking*, 420 U.S. at 237 n.10; *Firefighters*, 478 U.S. at 519. Consent decrees typically contain precise terms that are the result of negotiation and compromise. *Armour*, 402 U.S. at 681; *ITT Continental Baking*, 420 U.S. at 235. Thus, if the parties’ agreement can “lightly be undone” (*Swift*, 286 U.S. at 120), either party can improperly be deprived of the benefit of its bargain. But a consent decree is not merely a contract; it is also an order entered (and ultimately enforceable) by a court, and “a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed or new ones have since arisen.” *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). See Fed. R. Civ. P. 60(b)(5) (court may relieve party from a final judgment when “it is no longer equitable”). Thus, “[t]he type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable.” *Wright*, 364 U.S. at 652. “[A] federal court is more than ‘a recorder of contracts’ from whom parties can purchase injunctions,” *Firefighters*, 478 U.S. at 525, and “[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction.” *Wright*, 364 U.S. at 651.

B. Consent decrees are widely used to facilitate settlement because they enable parties to resolve complex disputes without incurring the costs and risks of litigating through all stages of trial and appeal. *Firefighters*, 478 U.S. at 528; *Armour*, 402 U.S. at 681. They also conserve scarce judicial resources. In addition, in large-scale institutional reform litigation, they permit the parties to formulate terms that are more suitable than the solution that might be imposed by a court that is comparatively inexpert and unfamiliar with the details of the underlying controversy. See *Kozlowski v. Coughlin*, 871 F.2d 241, 247 (2d Cir. 1989).

The assessment of whether modification of a consent decree is warranted in a particular case is a matter for the district court's equitable discretion. See Fed. R. Civ. P. 60(b). Because that assessment must turn on an evaluation of the particular circumstances in each case, it is inappropriate to attempt to prescribe precise rules to govern the exercise of the court's discretion. Nevertheless, the benefits that flow from the use of consent decrees will be maximized by the articulation of an appropriate standard under which that discretion is to be exercised, a standard that acknowledges and accommodates the decree's inherently "hybrid nature" (*Firefighters*, 478 U.S. at 519).

A standard that allows unconsented modifications too freely may inhibit litigants from entering into consent decrees in the first instance. Consent decrees "are normally compromises in which the parties give up something they might have won," *ITT Continental Baking*, 420 U.S. at 235 (1975). One of the incentives for this compromise is the assurance that the opposing party will be held to the agreement. If the

agreed-upon terms of the decree are subject to modification under standards that are not sufficiently stringent, that assurance is undermined, and neither party can rely on retaining the benefits of the bargain. Thus, the incentives for entering into a consent decree are reduced. See *Alliance To End Repression v. Chicago*, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc); *The Money Store, Inc. v. Harris-corp Finance, Inc.*, 885 F.2d 369, 377 (7th Cir. 1989) (Posner, J., concurring).

On the other hand, a modification standard that is too demanding is also likely to inhibit the negotiation of consent decrees, particularly in institutional reform cases where they typically contemplate "continuing supervision by the issuing court" (*Wright*, 364 U.S. at 647). Under such a standard, government authorities will be reluctant to agree to specific terms in a remedial scheme that could be "locked in[] * * * however the future may unfold," *Duran v. Elrod*, 760 F.2d 756, 762 (7th Cir. 1985), and to take the risk that any one of the decree's numerous, detailed provisions will remain in force even after experience and evolving circumstances have rendered it no longer suitable. Instead, responsible officials might well choose to assume the risks of litigation, relying on the court to impose the "bare minimum" relief required by statutory and constitutional constraints. *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980).

C. As is set forth in more detail in the following discussion, we believe that in the context of institutional reform litigation, substantial weight should be given to the judicial aspect of a consent decree. Unlike agreements regulating the conduct of private

parties, a consent decree that imposes wide-ranging, affirmative obligations aimed at effecting large-scale and long-term restructuring of a public institution may require significant adjustment in order to adapt the terms of the parties' original agreement to current experience and conditions. Thus, in this context, consent decrees cannot reasonably be presumed to embody a firm expectation by the parties that all of the terms of their agreement will inevitably continue to retain vitality in the face of necessarily uncertain future developments. Moreover, consent decrees governing the administration and operation of public facilities necessarily implicate the public interest, and the public fisc. Finally, a refusal to modify a consent decree governing a public institution, when an adequate showing of need has been made, may raise serious separation of powers and federalism concerns.

II. THE *SWIFT* STANDARD—REQUIRING A “CLEAR SHOWING OF GRIEVOUS WRONG”—IS INAPPROPRIATE IN THE CONTEXT OF THIS CASE

The district court, relying on this Court's decision in *Swift*, concluded that “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.” Pet. App. 8a (quoting 286 U.S. at 119). The district court also acknowledged that some courts have applied a less stringent standard in considering requests to modify consent decrees in institutional reform litigation, but found that under any standard, there was no basis for granting a modification that would disturb one of the most important agreed-upon terms of the consent decree. The court's consideration of the request under an alternative standard was, however, somewhat cursory, since it

found itself constrained by circuit precedent to apply the *Swift* standard.⁵ We submit that, as a general matter, there are such significant differences between the type of consent decree involved in *Swift* and a decree that terminates institutional reform litigation that the *Swift* standard should not apply in the latter context.

A. The *Swift* decision itself indicates that the standard there applied was not intended as a universally applicable test to determine when a court should grant a motion to modify a consent decree. The decree in *Swift*, which terminated a government antitrust action against the five leading meat packers in the United States, enjoined the defendants from engaging in any aspect of the grocery business. 286 U.S. at 111. Ten years later, the defendants moved, over the government's opposition, to modify the decree, claiming that changes within the industry warranted a modification to allow them to deal in groceries at the wholesale level. *Id.* at 112-114. This Court rejected that claim. Noting that the antitrust action in 1920 was premised on evidence that the defendants had engaged in gross abuses designed to limit competition unfairly, the Court explained that the record showed that the potential for this "ruth-

⁵ The court of appeals simply affirmed the denial of modification on the basis of the district court's decision. However, in a subsequent request for an interpretation of other terms of the same decree, the court of appeals approved the same district judge's acknowledgment that "courts in public law cases 'often must undertake a "continuing" involvement in the case, an involvement requiring flexibility * * * in the determination of the appropriate response to ensuing requests for * * * modification of the original order in light of changing circumstances.'" *Inmates of Suffolk County Jail v. Kearney*, No. 90-1858, slip op. 7-8 (1st Cir. Mar. 21, 1991) (quoting Order of Keeton, J.).

less and oppressive" misconduct still existed (*id.* at 119). While changes in the industry had occurred, the Court found that the concerns about abusive and unlawful practices that led to the imposition of the consent decree remained, and the defendants were not suffering "extreme hardship" by virtue of the decree. Under these circumstances, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." *Ibid.*

The Court in *Swift* carefully distinguished decrees imposing "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changed conduct or conditions and are thus provisional and tentative." 286 U.S. at 114. *Swift* itself involved "fully accrued" facts; in contrast, "[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need," *ibid.*, and "consent is to be read as directed toward events as they then were." *Id.* at 115. Consent is "not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." *Ibid.*

The Court's discussion in *Swift* thus suggests that modification of decrees that "involve the supervision of changed conduct or conditions and are thus provisional and tentative," may be appropriate "in adaptation to events to be," *id.* at 114-115, and that, accordingly, the modification standard in such a setting should be less stringent than the one applied in *Swift* itself.

Subsequent cases confirm this view of *Swift*. In *United States v. United Shoe Machinery Corp.*, 391 U.S.

244, 248 (1968), the Court approved a government motion to modify an injunctive decree, observing that the *Swift* "grievous wrong" language "must, of course, be read in light of th[e] context [of *Swift*]." Accord *Board of Education v. Dowell*, 111 S.Ct. 630, 636 (1991). And in *Chrysler Corp. v. United States*, 316 U.S. 556 (1942) (and *System Federation No. 91 v. Wright*, *supra*), the Court cited *Swift* in allowing modifications of consent decrees, but did not refer to the "grievous wrong" standard.⁶ Instead, in *Chrysler* the Court stated that, in determining whether to modify a consent decree, "the test to be applied * * * is whether the change serve[s] to effectuate or to thwart the basic purpose of the original consent decree." 316 U.S. at 562.

B. In contrast to the situation in *Swift*, the litigation in many "institutional reform" cases aims at effecting wide-ranging and large-scale changes in the nature and operation of a public institution in order to bring it into compliance with applicable constitutional standards. Moreover, modification is sought, not by a private party, but by a governmental body. Such litigation, brought against a federal, state, or local government entity, is unlike litigation against a private party, and, for several reasons, the distinctive character of decrees entered in this context militates in favor of a less stringent standard for modification than that articulated in *Swift*. Accord, *e.g.*, *New York State Association For Retarded Children v. Carey*, 706 F.2d 956, 969-971 (2d Cir.) (Friendly, J.), cert. denied, 464 U.S. 915 (1983); *Shapp*, 602 F.2d at 1119-1121; *Plyler v. Evatt*, 846 F.2d 208, 211-212 (4th Cir.), cert. denied, 488 U.S. 897

⁶ *Dowell* and *Wright* are discussed more fully below. See pp. 26-28 (*Dowell*), 19-20 (*Wright*), *infra*.

(1988); *Heath v. De Courcy*, 888 F.2d 1105, 1109-1110 (6th Cir. 1989). See also *Ruiz v. Lynaugh*, 811 F.2d 856, 861 & n.8 (5th Cir. 1987); *id.* at 863 & n.1 (concurring opinion); *Alliance To End Repression*, 742 F.2d at 1020; *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859, 862-864 (11th Cir. 1989); Note, *The Modification Of Consent Decrees In Institutional Reform Litigation*, 99 Harv. L. Rev. 1020 (1986).

1. A less stringent standard than that applied in *Swift* is warranted because developments that occur during the long-term implementation of a complex, ongoing institutional reform decree may necessitate that particular features of the decree be altered. *Shapp*, 602 F.2d at 1120; *Carey*, 706 F.2d at 970. As this case well illustrates, a salient feature of institutional reform litigation brought against a governmental entity is that the litigation is not aimed simply at enjoining a particular course of unlawful conduct in which the defendant is engaged. Rather, the litigation also seeks—often as its primary purpose—to restructure a public institution in order to ensure that in the future it is maintained in compliance with constitutional norms.

Because the goal of such cases is to alter substantially the nature of a large and complex facility—perhaps even replacing an existing regime for the administration of a government program—consent decrees entered in resolution of these matters typically are not limited to prohibitory directives of the kind involved in *Swift*. Instead, they impose numerous affirmative obligations upon the defendants, often requiring the expenditure of substantial public funds. Here, for example, respondents contended, and the district court found, that conditions at the existing Suffolk

County jail were unconstitutional. But the consent decree that ultimately resulted did not simply order the termination of specific practices found to be unlawful. Rather, the centerpiece of the decree was an order affirmatively requiring the defendants to build an entirely new detention facility, and establishing detailed standards for that facility.

Decrees like the one in this case are aimed at systemic, affirmative reform; because of the nature of the duties imposed, they necessarily contemplate that compliance with the decree will be achieved over a substantial period of time.⁷ Where, as here, implementation of the decree's provisions calls for a public body to make fundamental changes in the nature or operation of a facility or program, it is not contemplated that full implementation will be achieved immediately. Thus, the decree in this case did not require that pretrial detainees be given the benefits of the new housing at once, and, in fact, construction of the new facility was not completed until more than ten years after entry of the decree.

The fact that this kind of consent decree contemplates an ongoing process of compliance over a substantial period of time bears on the appropriate modification standard. Actions taken to achieve full compliance with such a decree necessarily take place in the future, in circumstances that cannot be fully predicted when the decree is drafted. See, *e.g.*, *Carey*, 706 F.2d at 970 n.17 (quoting Chayes, *Foreword: Public Law Litigation And The Burger Court*, 96

⁷ They may also, as in *Board of Education v. Dowell*, 111 S. Ct. 630, 631-632 (1991), be transitional—*i.e.*, they may impose requirements that are designed to ensure that compliance with applicable norms is achieved, but that cease to be appropriate once compliance is achieved.

Harv. L. Rev. 4, 56 (1982)) ; *Plyler*, 846 F.2d at 212 (same) ; *Ruiz*, 811 F.2d at 863 (concurring opinion) (same) ; see also *Shapp*, 602 F.2d at 1120 ("Any injunction imposing mandatory affirmative duties for the future involves elements of prediction."). Over time, the premises underlying the original decree may be undermined by new conditions, resulting from changes either in the applicable law or in the relevant facts. Adjustment of the terms of the decree may be necessary to accommodate such new conditions. See *Carey*, 706 F.2d at 970.

Perhaps the clearest example of the kind of changed condition that would warrant a modification is a change in the law that expressly authorizes a condition that the consent decree—in accordance with then prevailing law—was designed to prevent. For example, in *System Federation No. 91 v. Wright*, *supra*, a railroad and its unions were sued on the ground that they discriminated against nonunion employees, in violation of the Railway Labor Act, 45 U.S.C. 151 *et seq.* The litigation resulted in a consent decree that bound defendants not to engage in such discrimination. When the Railway Labor Act was later amended to permit union shop clauses in collective bargaining agreements, this Court held that the district court should have granted the motion of the union defendants to modify the consent decree to permit the negotiation of such a clause. Because the consent decree enjoined conduct that was now explicitly *authorized* by the statute, the Court concluded that equity required the modification. Although it recognized the importance of "[f]irmness and stability" in judicial decrees (364 U.S. at 647), that value, like the parties' interest in preserving the

benefits of their bargain, had to yield to the public policy expressed in the newly enacted law.⁸ Accord *Theriault v. Smith*, 523 F.2d 601, 602 (1st Cir. 1975) (consent decree obligating defendant to pay AFDC benefits "pursuant to [specified statutory provisions]" modified when Supreme Court held that specified provisions did not authorize the payments).

The situation in *Wright* is to be distinguished from the case in which a consent decree prohibits actions whose constitutionality—though in doubt at the time the decree was entered—has been subsequently established by this Court's decision. Such a decision resolving the question of constitutionality, while upholding the validity of a particular practice, does not represent an expression of federal policy approving that practice.⁹ The consent decree represents the par-

⁸ The Court explained that its conclusion "would not be affected by the circumstance, which the District Court here found, that the unions' hostility to nonunion employees still continued, for any discriminations that might be facilitated by the union shop clause have been legislatively determined to be an expense more than offset by the benefits of such a provision." 364 U.S. at 648-649.

⁹ For example, *Bell v. Wolfish*, *supra*, which rejected a challenge to the constitutionality of double-celling, did not represent a policy decision *endorsing* such housing. In contrast, in amending the Railway Labor Act, Congress weighed the merits of various labor policies and specifically endorsed union shops. The amendment thus conflicted with the consent decree's *prohibition* of such clauses. *Bell*, in contrast, cast no doubt on the propriety of the single-cell requirement to which the parties here had agreed.

We note that in *Firefighters*, this Court held that a court is not necessarily barred from entering an enforceable consent decree obligating the defendant to provide relief that the court could not have imposed in the absence of consent. 478 U.S. at 525. But in considering whether modification of a con-

ties' decision that a compromise is preferable to pursuing the legal issue to ultimate resolution. Thus, a party is not automatically entitled to the modification of a consent decree whenever subsequent legal developments clarify legal obligations that were unsettled at the time the decree was negotiated.¹⁰ The occurrence of such a clarification may, however, be a relevant factor for the court to consider in determining whether the total situation has changed sufficiently to warrant a modification.

Changed factual conditions are also relevant in determining whether a modification of a consent decree is warranted. The essential question is whether, in light of the changed circumstances, the proposed modification accords with the original purposes of the decree.¹¹ See, *e.g.*, *Carey*, 706 F.2d at 968-

sent decree is warranted, it is significant that in the same decision, the Court stressed that "a federal court is more than a 'recorder of contracts' from whom parties can purchase injunctions; it is 'an organ of government constituted to make judicial decisions.'" *Ibid.* (citations omitted). Thus, while the fit between what a court may order without the agreement of the parties and what a court may approve in a consent decree may not be exact, the legal landscape against which the decree must operate remains highly relevant, since the purpose of the decree is to "further the objectives of the law upon which the complaint was based." *Ibid.* (citations omitted). Cf. *Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984) (court may not modify a consent decree to impose conditions on a defendant to which it did not consent and that are not required by applicable law).

¹⁰ This is particularly true where, as here, the resolution of the issue was obviously imminent when the consent decree was negotiated. See Pet. App. 9a (*Bell* decided one week after consent decree approved).

¹¹ Of course, where a consent decree terminates litigation before a finding of liability has been entered, the court may not, in the interests of achieving the purposes of the consent

969; *Shapp*, 602 F.2d at 1120. Cf. *Chrysler*, 316 U.S. at 562 (in considering modification of a consent decree “the test to be applied * * * is whether the change served to effectuate or to thwart the basic purpose of the original consent decree”); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968) (modification appropriate where designed “to achieve the purposes of the provisions of the decree”).¹² Modification may be appropriate even if the new circumstances were not entirely unforeseeable when the decree was entered.¹³ For example,

decree, impose on the defendant additional burdens beyond those it agreed to assume. Even where, as here, the consent decree is entered after an adjudication of liability, additional burdens beyond those agreed to may not be imposed by modification of the decree unless those burdens are required by applicable law. See *Stotts*, 467 U.S. at 576-579; cf. *Armour*, 402 U.S. at 682.

¹² Bearing in mind the judicial as well as the contractual aspects of the decree, the purposes of the decree cannot be determined on a motion for modification solely on the basis of the terms of the decree. Compare *Chrysler*, 316 U.S. at 562, with *Armour*, 402 U.S. at 681-682. It is appropriate, in the context of litigation such as this, to look also to such factors as the wrongs alleged in the complaint, the judicial findings and conclusions, if any, on which the decree was based, and the constitutional objectives that the parties and the court were attempting to attain.

¹³ The foreseeability of the change may nevertheless be relevant to determining whether the proposed modification is consistent with the purposes of the decree; presumably, the parties' consent to the decree was based on their anticipation of a range of predictable future events. Cf. *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987) (denying modification motion in prison overcrowding context); *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988) (same). Moreover, to the extent that changed conditions reasonably can be anticipated, the parties can provide for such contin-

experience in operating under a decree may demonstrate that, despite good faith efforts by the defendant to comply with its terms, a particular goal is unattainable or a particular provision of the decree is unworkable. See, e.g., *Shapp*, 602 F.2d at 1118, 1120 (State unable to find enough clients to provide required number of medical tests); *Carey*, 706 F.2d at 971 (State unable to find sufficient housing facilities of required size). See also p. 18 note 7, *supra*.

A good faith effort to comply with the decree's requirements is an essential prerequisite; a defendant may not obtain a modification of a consent decree simply because it discovers that its interests are not well served by its judicially approved bargain. See *Alliance To End Repression*, 742 F.2d at 1020 ("who will make a binding agreement with a party that is free to walk away from the agreement whenever it begins to pinch?"). The new condition must be a significant change from the conditions prevailing when the decree was entered—one that makes compliance with the decree substantially more onerous. For example, in this case, it was anticipated in 1979 that the Suffolk County pretrial detainee population would decline, and the original decree was negotiated on this assumption. 90-954 Pet. 3-4. When that assumption proved incorrect, the decree was modified by mutual agreement in 1985 to provide for a greater

gencies in the original decree. Cf. *Chrysler Corp. v. United States*, 316 U.S. 556 (1942) (consent decree provided that certain restrictions would be lifted if no final order entered in related litigation by specified date); *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077 (3d Cir. 1987); 42 U.S.C. 9622(f)(6) (covenant not to sue pursuant to a consent decree must contain provision permitting United States to reopen litigation if pollution is worse than anticipated).

number of cells, to take into account "the unanticipated increase in jail population." J.A. 110. Cf. *Rhodes v. Chapman*, 452 U.S. 337, 350-351 n.15 (1981).¹⁴

2. In the context of institutional reform litigation, the inquiry whether a modification is warranted must also be informed by substantial public interest considerations. Unlike consent decrees entered against private parties, as in *Swift*, consent decrees that are entered against public bodies and that involve large-scale restructuring of government facilities necessarily "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions." *Heath*, 888 F.2d at 1109; accord *Plyler*, 846 F.2d at 215; *Duran*, 760 F.2d at 759, 762.¹⁵ Satisfactory resolution of the question whether and to what extent such a decree should be modified in a particular set of circumstances requires that weight be given to the potential effect on the public interest, for the court is not simply "a recorder of contracts," bound by the parties' agreement to maintain a continuing injunction. *Firefighters*, 478 U.S. at 525; *Wright*, 364 U.S. at 651. Thus, in this case, if—as a result of significantly changed conditions—adherence to a single-celling regime requires the release of some detainees who would otherwise remain incarcerated, see Pet. App. 13a, denying modification may be adverse to the public interest by rendering law enforcement less effective and impairing the security of the community.

¹⁴ It is unclear whether the increases in the pretrial detainee population since 1985 present a similarly significant changed condition.

¹⁵ Although substantial public interest concerns were also involved in *Swift*, as in all government antitrust litigation, they did not support the requested modification.

See *Heath*, 888 F.2d at 1106-1110 (considering the public's interest and allowing modification of consent decree to permit double-celling); *Plyler*, 846 F.2d at 209-216 (same); *Duran*, 760 F.2d at 757-763 (same); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc) (same).

3. The standard for the modification of consent decrees terminating institutional reform litigation should also reflect federalism and separation of powers concerns. As this case illustrates, institutional reform litigation against state and local officials may place the district court in the position of supervising and overseeing a "complex, ongoing remedial decree" involving a public institution. *Shapp*, 602 F.2d at 1120; *Carey*, 706 F.2d at 970. Moreover, such decrees may require substantial public expenditures over a significant period of time. By effectively locking in the terms of a federal court order that may no longer be appropriate or necessary, an overly stringent standard for considering modification motions intrudes upon the discretion normally reserved to state and local officials charged with the responsibility for efficient administration. See, e.g., *Ruiz*, 811 F.2d at 863 (Hill, J., concurring) (federal court involved in institutional reform litigation "must balance its duty to protect federal constitutional and statutory rights with the delicate problems of federalism and separation of powers which are always implicated when a federal court directs state authorities to take certain actions in administering a state-run institution").¹⁶

¹⁶ State or local officials may sometimes willingly allow themselves to become locked in to inappropriately burdensome obligations by means of a consent decree, in order to evade political constraints or to limit the policy discretion of officials in succeeding administrations. See, e.g., *Kasper v. Board Of Election Commissioners*, 814 F.2d 332, 340-342 (7th Cir. 1987); cf. *Newman v. Graddick*, 740 F.2d 1513, 1517 (11th

These concerns about the proper relationship between the federal courts and state and local governments are reflected in *Board of Education v. Dowell*, 111 S. Ct. 630 (1991), where the question was whether termination of an ongoing school desegregation decree was warranted on the ground that the decree was no longer necessary to achieve compliance with constitutional requirements. The court of appeals held that termination was inappropriate, but this Court reversed. The Court reasoned that continuing exercise of the federal courts' jurisdiction, after compliance had been achieved, would improperly intrude into the discretion of local school authorities, thereby colliding with important "[c]onsiderations based on the allocation of powers within our federal system" (111 S. Ct. at 637). Although *Dowell* did not involve a consent decree, it suggests that, in con-

Cir. 1984) (noting that state officials entered into consent decree on the "last day of their administration").

Similar problems may arise when a court enters a consent decree against a federal officer or agency that purports to bind succeeding administrations on major points of discretionary policy. See *Citizens For A Better Environment v. Gorsuch*, 718 F.2d 1117, 1134 (D.C. Cir. 1983) (Wilkey, J., dissenting) ("For reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion."), cert. denied, 467 U.S. 1219 (1984); *National Audubon Society v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1982) (noting "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party"); *Alliance To End Repression*, 742 F.2d at 1020 (interpreting FBI consent decree to ensure that "co-equal branch of government" did not "improvidently surrender[] its obligations"; thus "maintain[ing] a proper separation of powers"); *The Money Store*, 885 F.2d at 375-376 (Posner, J., concurring).

sidering a state or local governmental body's motion to modify an injunctive decree, delineation of the proper scope of the district courts' equitable discretion must be informed by the values of federalism. Cf. *Duran*, 760 F.2d at 759.

To be sure, *Dowell* itself turned on the special context of school desegregation (111 S. Ct. at 637). But the principle that federal courts must act with due regard for the administrative discretion properly reserved to state and local officials has been repeatedly emphasized in this Court's decisions dealing with prison conditions—the context of this case. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 407-408 (1989); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes*, 452 U.S. at 351 & n.16, 352; *Bell*, 441 U.S. at 540-541 n.23, 547 & n.29; *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

In these decisions, this Court has admonished that “the judiciary is ‘ill equipped’ to deal with the difficult and delicate problems of prison management,” *Thornburgh*, 490 U.S. at 407-408, and that, accordingly, in determining whether conditions of confinement fail to satisfy constitutional requirements so as to warrant an injunctive decree, the courts must keep in mind that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.” *Turner*, 482 U.S. at 84-85. Moreover, “[w]here a state penal system is involved, federal courts have * * * additional reason to accord deference to the appropriate prison authorities,” *id.* at 85; “internal problems of state prisons involve issues * * * peculiarly within state authority and expertise, [and] the States have an

important interest in not being bypassed in the correction of those problems." *Preiser*, 411 U.S. at 492.¹⁷

As *Dowell* demonstrates, the concerns about undue infringement of state and local authority that arise on an initial determination that an institution of government is acting unconstitutionally may also arise when a government body urges that current circumstances and the public interest require that provisions of an existing injunctive decree be set aside. While care must be taken not to discourage settlements, a modification standard that is too demanding in this context may preclude the district court from paying adequate attention to the responsible officials' judgments as to why the requested relief is warranted under the circumstances. Principles of federalism dictate that the standards for evaluating modification motions in this setting reflect the defer-

¹⁷ On the other hand, in litigation brought by the federal government against a state or local government, concerns arising from the Supremacy Clause may justify the application of a different standard for the review of requests by defendants for the modification of consent decrees. For example, in decrees seeking to implement the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and the Ocean Dumping Act, 33 U.S.C. 1401 *et seq.*, locally owned sewer systems and treatment works may be required to implement very expensive remedial actions, which later face taxpayer resistance or objections by neighbors to the proposed site of the facility. The requirements of federal supremacy would support a stringent modification test in those circumstances. See, *e.g.*, *United States v. County of Nassau*, 733 F. Supp. 563 (E.D.N.Y. 1990), *aff'd*, 907 F.2d 397 (2d Cir.) (modification denied). Similarly, public interest and Supremacy Clause concerns may warrant a more stringent test whenever the federal government seeks to enforce a consent decree against state or municipal defendants. This Court need not consider in this case whether a different standard should apply in those situations.

ence due to the legitimate, good-faith, and informed assessments of those officials. See *Ruiz*, 811 F.2d at 863 (Hill, J., concurring).¹⁸

* * * * *

In institutional reform litigation, we urge acceptance of a standard under which a request for modification will be permitted upon a showing that the requested modification is suitably tailored to adapt the decree to pertinent changes in circumstances, and is in keeping with the essential purposes of the decree. Such a standard is consistent with this Court's precedents and properly respects the utility and hybrid character of consent decrees. It provides the necessary flexibility, without sanctioning modifications that would improperly deprive a party of the benefit of its bargain.

In this case, the district court appeared to regard itself as bound by circuit precedent to apply the more stringent *Swift* standard.¹⁹ Thus, it gave only cur-

¹⁸ This case involves institutional reform litigation brought against state and local entities, but analogous concerns rooted in equally pressing separation of powers principles are implicated where an agency of the federal government that is subject to a consent decree seeks modification of the decree's provisions. Cf. *Turner*, 482 U.S. at 85 ("Prison administration is * * * a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint."). Where a consent decree is entered bearing upon a federal facility or program, a modification motion filed by the government officials lawfully charged with the authority and responsibility for administering that facility or program is entitled to respect from the courts. For reasons analogous to those discussed in the text, due regard for the scope of agency discretion in the light of changed conditions demands a modification standard that is not unduly rigid.

¹⁹ But see note 5, *supra*.

sory consideration to the critical question whether changed circumstances might warrant a modification under an alternative standard. And, the court of appeals, in affirming, indicated no disagreement with the district court's approach.

Because the courts below appear to have misread the *Swift* decision, and thus to have placed improper reliance on the standard applied in that decision, the case should be remanded to permit full consideration of the facts and circumstances relevant to evaluation of the modification request under the appropriate standard.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID L. SHAPIRO
Deputy Solicitor General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

ROBERT E. KOPP
THOMAS M. BONDY
Attorneys

APRIL 1991

Nos. 90-954, 90-1004

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,

Petitioners,

-against-

INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,

Respondents.

(caption continued on following page)

**BRIEF OF AMICUS CURIAE
THE CITY OF NEW YORK**

VICTOR A. KOVNER,
Corporation Counsel of
The City of New York,
Attorney for Amicus Curiae
The City of New York,
100 Church Street,
New York, New York 10007.
(212) 788-1035 or 1064

LEONARD J. KOERNER,*
FAY LEOUSSIS,
TIMOTHY J. O'SHAUGHNESSY,
of Counsel.

April 15, 1991

*Counsel of Record.

Supreme Court, U.S.

FILED

APR 12 1991

OFFICE OF THE CLERK



**GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,**

Petitioner,

-against-

**INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,**

Respondents.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE ..	1
SUMMARY OF ARGUMENT	6
POINT I	18
<p>BECAUSE MANY LOWER FEDERAL COURTS, INCLUDING THE TWO COURTS HERE, ARE UNDER THE ERRONEOUS IMPRESSION THAT THERE IS A "SWIFT STANDARD" THAT MAY OR MAY NOT APPLY IN FEDERAL CLASS-ACTION CIVIL RIGHTS LITIGATION, THIS COURT SHOULD HOLD THAT MODIFICATION WILL LIE WHEN THERE IS ANY MATERIAL CHANGE IN LAW OR FACT OR WHEN INCREASED EXPERIENCE WITH THE FACTS YIELDS A BETTER UNDERSTANDING OF HOW THE CONSTITUTIONAL OR STATUTORY VIOLATION SHOULD BE REMEDIED.</p>	
POINT II	32
<p>SEVERAL ARGUMENTS THAT PLAINTIFFS OFTEN RAISE IN OPPOSITION TO MODIFICATION REQUESTS DO NOT WITHSTAND ANALYSIS.</p>	
CONCLUSION	44



TABLE OF AUTHORITIES

<u>Cases:</u>	Page
<u>Benjamin v. Malcolm,</u> 495 F Supp 1357 (SDNY, 1980) ...	4
<u>Benjamin v. Malcolm,</u> 564 F Supp 668 (SDNY, 1983) ...	30
<u>Board of Education v. Dowell,</u> ___ US ___, 111 S Ct 630 (1991) ..	16 17 18 19 43
<u>Browder v. Director,</u> 434 US 257 (1978)	22
<u>Chrysler Corp. v. United States,</u> 316 US 556 (1942)	12 26
<u>Dowell v. Board of Education,</u> 890 F2d 1483 (10th Cir, 1989), rev'd, ___ US ___, 111 S Ct 630 (1991)	17
<u>Duran v. Elrod,</u> 760 F2d 756 (7th Cir, 1985)	29 32 36 38 41
<u>Fortin v. Commissioner,</u> 692 F2d 790 (1st Cir, 1982)	22
<u>Heath v. DeCourcy,</u> 888 F2d 1105 (6th Cir, 1989) ...	9 23 29 41
<u>Keith v. Volpe,</u> 784 F2d 1457 (9th Cir, 1986) ...	9

Nelson v. Collins, 659 F2d
420 (4th Cir, 1981) (en banc) ... 12 21

New York State Association
for Retarded Children v. Carey,
706 F2d 956 (2d Cir), cert.
denied, 464 US 915 (1983) 22 23 24
25 30 37

Newman v. Graddick,
740 F2d 1513 (11th Cir, 1984) ... 12

Philadelphia Welfare Rights
Organization v. Shapp, 602 F2d
1114 (3d Cir, 1979), cert.
denied, 444 US 1026 (1980) 31 36 38

Plyler v. Evatt, 846 F2d
208 (4th Cir), cert. denied,
488 US 897 (1988) 9 21 29
41

Procunier v. Martinez,
416 US 396 (1974) 40

Ruiz v. Lynaugh, 811]
F2d 856 (5th Cir, 1987) 9

Spangler v. Pasadena City
Board of Education, 611
F2d 1239 (9th Cir, 1979) 19

System Federation No. 91
v. Wright, 364 US 642 (1961) ... 13 21 31
32 33 35
36

United States v. Armour & Co.,
402 US 673 (1971) 42



Nos. 90-954, 90-1004

**IN THE
SUPREME COURT OF THE UNITED STATES**

**ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,**

Petitioners,

-against-

**INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,**

Respondents.

**GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,**

Petitioner,

-against-

**INMATES OF THE SUFFOLK COUNTY JAIL,
et al.,**

Respondents.

**BRIEF OF AMICUS CURIAE
THE CITY OF NEW YORK**

INTEREST OF AMICUS CURIAE

The City of New York is under permanent injunctions in several federal class-action civil rights lawsuits. The City also is a defendant in other such lawsuits and must choose in those cases whether to negotiate a consent decree or litigate the issues. The City therefore has a very great interest in the standard to be applied by the federal courts on applications to modify permanent injunctions in class-action civil rights lawsuits.

In addition, in the present case, as we understand the Sheriff's request for relief, the Sheriff seeks one thing, double-celling in certain cells, for one reason, an unanticipated increase in population. Although we would by no means characterize as simple the issues here, in fact requests for modifications of injunctions in federal class-action civil rights litigation often

present considerably more complex circumstances and arguments both for and against the relief requested. For example, the City has been under injunctions involving conditions at Riker's Island, a jail for pretrial detainees. After a trial in 1976-77, the City stipulated that conditions were unconstitutional and that the population of 1350 constituted unconstitutional overcrowding. In 1980 the plaintiffs moved for an order setting a population cap well below that figure. In order to set a population cap, the District Court considered intervening improvements in conditions. In other words, although it was undisputed that 1350 was overcrowded under conditions at the time of the 1976-77 trial, to determine what constituted unconstitutional overcrowding in 1980 the District Court was required to examine all the changes in conditions between 1976-77 and 1980.



Benjamin v. Malcolm, 495 F Supp 1357 (SDNY, 1980). This obviously constituted a factual inquiry almost as broad as the original trial on the merits.

Another example is provided by Jose P. v. Sobol, 79 C 270 (EHN) (EDNY). In that case and two related cases plaintiffs claim that the New York City Board of Education is violating the rights of handicapped students under federal and New York State statutes. The District Court has entered numerous orders, both on consent and after litigated motions, requiring the parties to negotiate a resolution of the issue of how the Board should evaluate the needs of handicapped students. This has led to almost-weekly meetings of teams of attorneys and educators on both sides that, we believe, have produced little or no progress at substantial cost. In 1989 the plaintiffs' attorneys spent over 2,000 billable hours in

these meetings for which they received well over \$300,000 in attorneys' fees from the Board. In 1990 the newly-appointed Schools Chancellor moved to modify all previous orders in order to provide for a six-month moratorium on such meetings so that the Chancellor's staff might devote its time not to meeting, and preparing to meet, with plaintiffs but rather to producing a comprehensive proposal to be submitted at the end of that time. Deciding such a motion involves consideration of every conceivably relevant fact and circumstance and application of a great deal of judgment.

What the City hopes to add to the Court's consideration of this case is some indication of the extraordinarily varied and complex contexts in which motions for modification of injunctions arise in federal class-action civil rights litigation. This Court has never directly addressed the



standard to be applied by the District Courts when deciding such motions. This Court's ruling herein will have enormous consequences outside the context of whether the consent decree here will be modified to permit double-celling in an ultramodern facility. Just as they have looked to United States v. Swift & Co., 286 US 106 (1932), the lower federal courts will look to the Court's decision herein for a standard to be applied to all motions to modify consent decrees and litigated injunctions in class-action civil rights litigation.

SUMMARY OF ARGUMENT

The lower federal Courts have struggled with Swift, and the question of whether the standard applied in that case is applicable in federal class-action civil rights cases. However, we submit that it is plain from the language of Swift and this Court's subsequent discussions of Swift that this



Court did not announce in that case a "grievous wrong" standard to be applied to every application to modify an injunction in the federal Courts. The lower federal Courts have struggled with Swift because they have sought to find in that case a standard of general application. This Court should hold in this case that requests for modification of injunctions in federal class-action civil rights cases may be granted, in the District Court's discretion, whenever there has been a material change of fact or law or increased experience with the facts has yielded a better understanding of how to remedy the violation at issue.

In Point II we address several arguments that plaintiffs often make in opposition to motions by defendants for modification of injunctions in federal class-action civil rights cases. Chief among these is the argument that a higher standard

should apply when the injunction was the product of consent and not a litigated motion. We argue that this and the other arguments analyzed do not withstand analysis.

POINT I

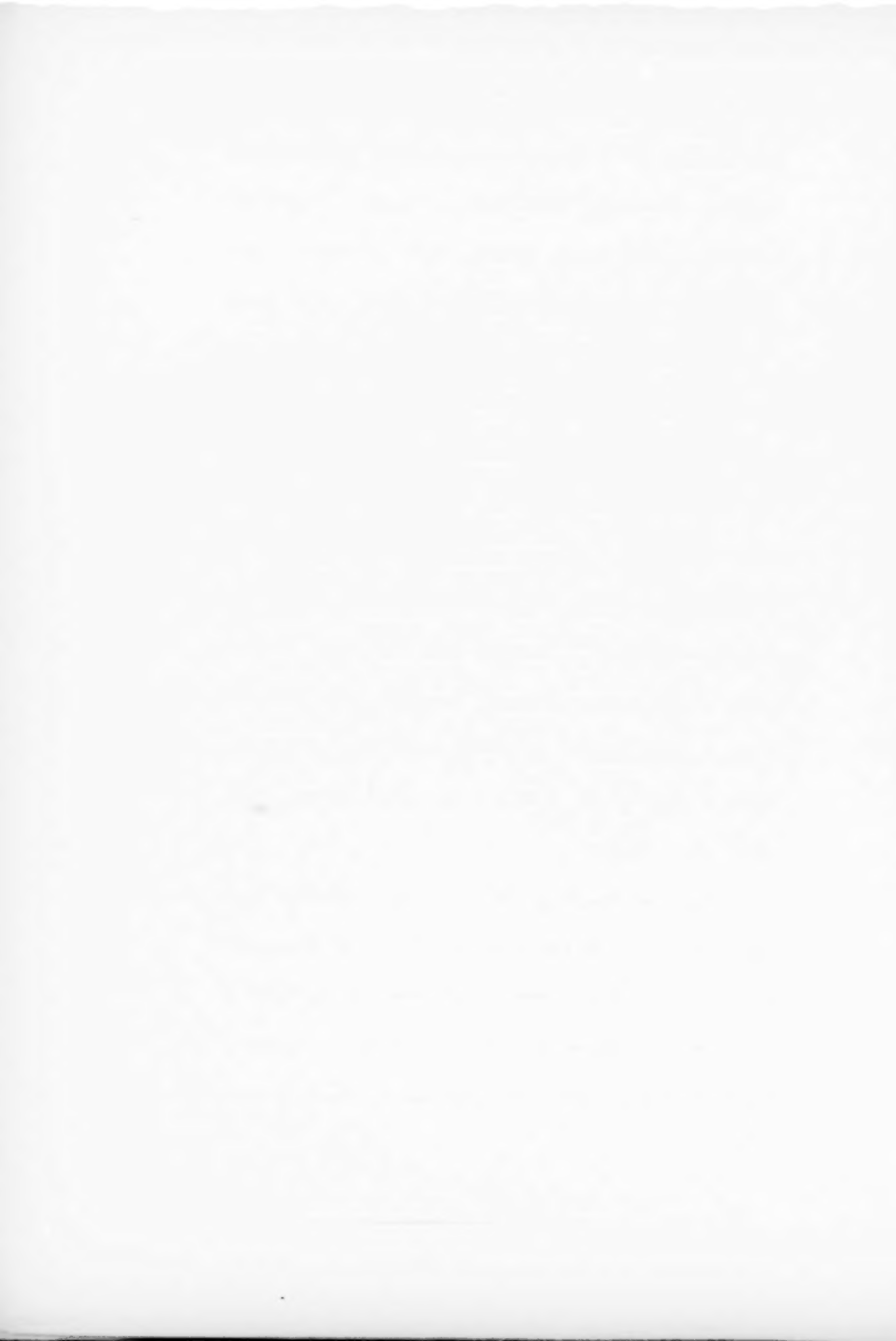
BECAUSE MANY LOWER FEDERAL COURTS, INCLUDING THE TWO COURTS HERE, ARE UNDER THE ERRONEOUS IMPRESSION THAT THERE IS A "SWIFT STANDARD" THAT MAY OR MAY NOT APPLY IN FEDERAL CLASS-ACTION CIVIL RIGHTS LITIGATION, THIS COURT SHOULD HOLD THAT MODIFICATION WILL LIE WHEN THERE IS ANY MATERIAL CHANGE IN LAW OR FACT OR WHEN INCREASED EXPERIENCE WITH THE FACTS YIELDS A BETTER UNDERSTANDING OF HOW THE CONSTITUTIONAL OR STATUTORY VIOLATION SHOULD BE REMEDIED.

(A)

We submit that this Court did not intend to establish, in United States v. Swift & Co., supra, 286 US 106, a strict standard to be applied to all requests for modification of permanent injunctions and that those

Courts of Appeals that have held Swift not applicable in federal class-action civil rights cases, creating instead a new, "flexible" standard for such cases, are correct. See Heath v. DeCourcy, 888 F2d 1105, 1110 (6th Cir, 1989) ("We agree with those circuits and hold that in the area of institutional reform litigation, consent decrees arrived at by mutual agreement of the parties involved are subject to a lesser standard of modification than that dictated by Swift."); see also Plyler v. Evatt, 846 F2d 208, 211-12 (4th Cir), cert. denied, 488 US 897 (1988); Ruiz v. Lynaugh, 811 F2d 856, 861 (5th Cir, 1987); Keith v. Volpe, 784 F2d 1457, 1460 (9th Cir, 1986).

As we explain below, we believe that Swift did not attempt to set forth a standard to be applied to every request to modify a permanent injunction in the federal courts. Even if Swift were thought ambiguous in this



respect, this Court's subsequent decisions make quite plain that Swift announced a standard to be applied when, as in Swift, the factual circumstances have changed very little, if at all, since the injunction was entered.

In Swift this Court stated that an injunction may be modified if changed circumstances have turned the injunction into an "instrument of wrong" and that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 US at 114-15, 119. But this Court also said, before making the statements quoted above, id. at 114 (citations omitted):

A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully

accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.

In addressing the merits of the motion for modification, this Court concluded that the defendants, who sought to modify an antitrust decree against them, were still in a position to commit the evils that the injunction had been designed to prevent. This Court stated, id. at 119:

Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression.

Thus, although this Court did not say so in so many words, this Court considered that case to be one involving "rights fully

accrued upon facts so nearly permanent as to be substantially impervious to change" and not an injunction "provisional and tentative." Id. at 114. See Newman v. Graddick, 740 F2d 1513, 1520 (11th Cir, 1984); Nelson v. Collins, 659 F2d 420, 423-24 (4th Cir, 1981) (en banc).

Ten years later, in Chrysler Corp. v. United States, 316 US 556 (1942), this Court considered a modification request by the government, as plaintiff, in a civil antitrust case. Citing Swift, this Court said, 316 US at 562:

We think that the test to be applied in answering [the] question [of whether the District Court abused its discretion in granting the request] is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. United States v. Swift & Co., 286 US 106.

This Court then affirmed the District Court's decision to modify the injunction by substituting "January 1, 1943" for "January

1, 1941" as the date Chrysler would be relieved of certain restrictions if the government had not prevailed in a similar lawsuit against General Motors. 316 US at 563-64. Thus, this Court did not apply the "grievous wrong" standard applied in Swift.

In 1961 this Court said, System Federation No. 91 v. Wright, 364 US 642, 647-48 (1961):

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been



decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." United States v. Swift & Co., supra, at 114-115. A balance must be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances.

Where there is such a balance of imponderables there must be wide discretion in the District Court.

In that case this Court granted modification of a consent decree where a statute upon which the decree in part was based was amended to permit a union shop, which previously had been prohibited. The Court did not invoke Swift's reference to a "grievous wrong evoked by new and unforeseen conditions."

In United States v. United Shoe Machinery Corp., 266 F Supp 328, 330 (D Mass, 1967), a District Court, hearing a modification request by the government in a

civil antitrust case, held that under Swift it could modify the injunction only upon finding "(1) a clear showing of (2) grievous wrong (3) evoked by new and unforeseen conditions." This Court reversed, stating that nothing in Swift precluded the relief sought. 391 US 244, 248 (1961). This Court said of Swift, id. (emphasis in original):

After reviewing the evidence, [this] Court concluded that the danger of monopoly and of the elimination of competition which led to the initial government complaint and the decree had not been removed and that, although in some respects the decree had been effectuated, there was still a danger of unlawful restraints of trade. The Court's language, quoted and relied on by the trial court here, to the effect that "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change," [286 US] at 119, the decree, must, of course, be read in light of this context. Swift teaches that a decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of



the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved.

This Court then held, citing Swift and Chrysler, that the District Court had not merely power, but in fact the duty, to modify its original decree if the decree had not achieved its purpose of restoring workable competition in the defendant's industry. 391 US at 251-52.

Finally, just this year this Court held Swift inapplicable in a class-action civil rights case, Board of Education v. Dowell, ___ US ___, 111 S Ct 630 (1991). In that case the District Court had vacated a school desegregation injunction on the ground that the school district had come into compliance with the Constitution, but the Court of Appeals had reversed on the ground that the school district had not shown that the injunction had caused it "'grievous wrong evoked by new and unforeseen conditions,"

Dowell v. Board of Education, 890 F2d 1483, 1490 (10th Cir, 1989) (quoting United States v. Swift & Co., supra, 286 US at 119). This Court reversed and remanded. Swift was dismissed as irrelevant because the defendants there had attempted for a decade to frustrate operation of the decree ab initio and it was in that context that this Court said that the defendants could be granted modification only upon a showing of a "grievous wrong evoked by new and unforeseen conditions." 111 S Ct at 636. This Court also repeated United Shoe's observation that Swift had held that "'Swift teaches ... a decree may be changed upon an appropriate showing, and it holds that it may not be changed ... if the purposes of the litigation as incorporated in the decree ... have not been fully achieved.'" Id. (quoting United States v. United Shoe Machinery Corp., supra, 391 US at 248).

This Court then stated that the purposes of a school desegregation litigation are "'fully achieved'" when the school district is operated in compliance with the Constitution and it is unlikely that the school board would return to its former, unconstitutional ways. 111 S Ct at 636-37.

This Court also found in Dowell that considerations "based on the allocation of powers within our federal system" also demonstrate that Swift is irrelevant to injunctions in school desegregation cases. This Court stated that the legal justification for school desegregation decrees, a constitutional violation, is removed when school authorities have operated in compliance with the Constitution for a reasonable period of time and that "'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory

control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.'" 111 S Ct at 637 (quoting Spangler v. Pasadena City Board of Education, 611 F2d 1239, 1245 n.5 [9th Cir, 1979] [Kennedy, J., concurring] [citation omitted]).

In sum, we quoted from the preceding cases at such length because we believe that it is surprising, considering the language of Swift and this Court's subsequent observations about Swift, that the lower federal courts ever entertained the notion that the "grievous wrong" "standard" of Swift would apply to every request for modification of an injunction in the federal Courts. Dowell should go some of the distance required to dispel this notion, but that case involved only the question of vacatur of an injunction on the ground that its remedial purposes have been achieved

and not the question of whether Swift applies to a request for modification of an injunction. We respectfully submit that in this case this Court should make plain that the "grievous wrong" language of Swift is limited to cases like Swift, i.e., those involving "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change," 286 US at 114, and has no relevance in federal class-action civil rights litigation involving remedial injunctions directed at public agencies charged with the formidable responsibility of operating, for example, a large urban police force, housing for thousands of mentally retarded children or a jail for pretrial detainees in a large city.

(B)

We therefore respectfully suggest that this Court should hold in this case that

modification of a permanent injunction in a federal class-action civil rights lawsuit will lie whenever there has been a material change in either (1) the relevant facts or (2) the applicable law. This Court applied such a standard in System Federation No. 91 v. Wright, supra, 364 US at 647, when it said:

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen.

The Fourth Circuit Court of Appeals has stated explicitly that this is the standard for class-action civil rights cases. Plyler v. Evatt, supra, 846 F2d at 211; Nelson v. Collins, supra, 659 F2d at 424. Whether a particular request for modification should be granted in a particular case depends, of course, on the facts of that case and is a question for the District Court to answer in

the exercise of its discretion. Browder v. Director, 434 US 257, 263 n.7 (1978).

There is a third circumstance, however, in which modification should lie. This circumstance has been described as: when the injunction fails to accomplish the intended result, United States v. United Shoe Machinery Corp., supra, 391 US at 249; when "the remedy is not working effectively or is unnecessarily burdensome," New York State Association for Retarded Children v. Carey, 706 F2d 956, 970 (2d Cir) (quoting Fiss, The Supreme Court -- 1978 Term -- Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 49 [1979]), cert. denied, 464 US 915 (1983); "when unforeseen obstacles present themselves [or] a better understanding of the problem emerges," id. at 969; when the injunction proves unworkable on a better appreciation of the facts, Fortin v. Commissioner, 692

F2d 790, 800 (1st Cir, 1982); and when the District Court identifies "a defect or deficiency in its original decree which impedes achieving its goal, either because experience has proven it less effective, disadvantageous, [sic] or because circumstances and conditions have changed which warrant fine-tuning the decree," Heath v. DeCoursey, supra, 888 F2d at 1109.

An example of this third circumstance is found in New York State Association for Retarded Children v. Carey, supra, 706 F2d 956. The District Court previously had held unconstitutional the conditions at Willowbrook, a large State-run home for retarded children in New York City. Id. at 958. In 1975 the State entered into a consent decree requiring that Willowbrook be closed and its residents be placed in facilities of 10 or 15 beds each. Id. at 959.

In attempting to implement this decree, the State found that the housing shortage in New York City would have rendered facilities of that size prohibitively expensive. Id. at 965-66. The State sought modification of the decree in order to permit facilities of up to 50 beds each. At the hearing on the motion the State produced expert witnesses who testified that facilities of the size contemplated by the original decree would not be appropriate for the health and psychological well-being of the children. Id. at 966. The plaintiffs opposed the motion for modification and produced expert witnesses who controverted the State's witnesses. Id. at 966-67. At the time of the hearing 2400 of Willowbrook's 5700 residents were still at Willowbrook or in other large facilities. Id. at 958, 965. The District Court, for the most part, denied modification. Id. at 960, 967.

The Court of Appeals for the Second Circuit reversed. The Court recognized that the smaller facilities called for by the original decree would have been prohibitively expensive and concluded that the District Court's denial of the motion inappropriately placed the objective of smaller facilities ahead of the closing of Willowbrook, the objective of the entire lawsuit. Id. at 965-66, 967. In short, the Court of Appeals took into account every relevant fact and circumstance, including the facts that the resources available were limited and that public agencies such as that involved in that case operate in what the Court of Appeals called a "complex environment." Id. at 966. Had the Court of Appeals taken a stricter view of the showing required for modification, it might have held that neither the housing shortage nor the State's experts' testimony constituted changed circumstances

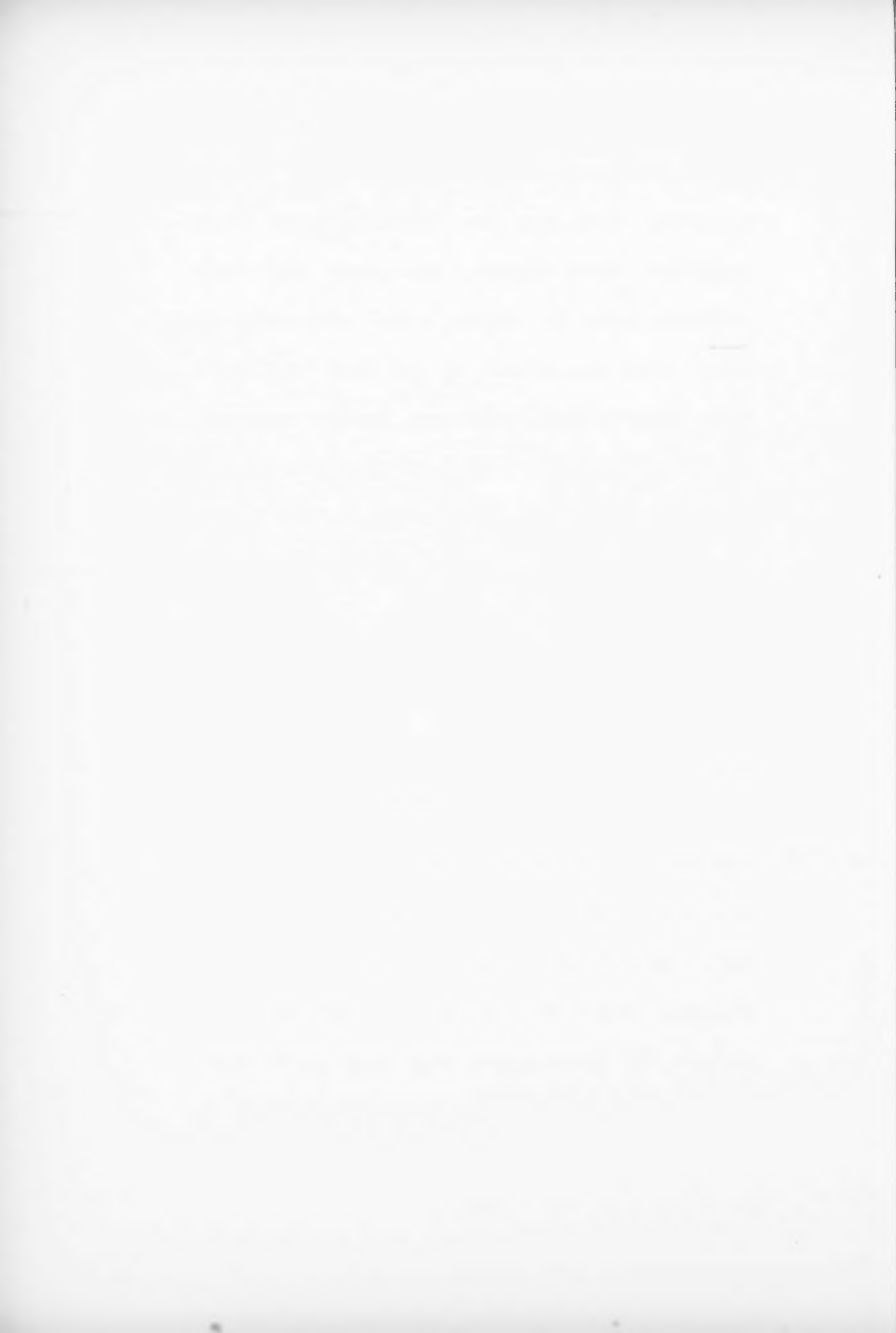
of fact. However, by taking a pragmatic view of the situation the Court of Appeals reached a result that, we submit, was the best result in light of the numerous interests at stake.

This third ground on which modification may be granted, a better understanding of how to remedy the situation addressed, can be found outside the context of federal class-action civil rights litigation. For example, we submit that the modifications in Chrysler Corp. v. United States, supra, 316 US 556, and United States v. United Shoe Machinery Co., supra, 391 US 244, are better described as based on this ground than on changed circumstances of law or fact.

It is in federal class-action civil rights litigation, however, that this ground will arise more often and will more often supply a basis for modification. While we do not



attempt to excuse violations of constitutional or federal statutory rights, the public agencies that are the defendants in such litigation have limited resources and face difficult tasks in complex legal environments. Even more significant is the fact that they have little control over the factors that are the most important in defining the nature and magnitude of the problems that those agencies address. For example, in the present case, as we understand it, the Sheriff is charged with the responsibility of housing Suffolk County's criminal defendants who do not make their bail. The number of such persons is the product of at least the following: the number of persons arrested and the number and nature of the crimes they committed; what crimes they are charged with; the amount of bail set; the number of defendants who can post their bail; the length of time from arraignment to



trial; the length of trial; the number of persons convicted; the number of persons who plead guilty; the length of time from conviction or plea to sentencing; and the length of time from sentencing until transfer to the State prison system. The Sheriff has no control over any of these factors. And to say that the Sheriff has limited resources is an understatement: the Sheriff was forced to sue the Mayor and City Council for the funds to construct the New Jail some eleven years after the District Court had held unconstitutional the conditions at the Charles Street Jail.

One other factor leads, as a general matter, to the conclusion that in federal class-action civil rights litigation modification often will be appropriate when experience has yielded a better understanding of how to remedy the violation at issue. That factor is the interest of third parties not before the



District Court and of the public in general. Cases involving overcrowding of jails and prisons provide perhaps the best examples; undoubtedly, if population caps lead to the release of individuals who otherwise would not have been released, at some point the population cap will thus indirectly lead to someone becoming the victim of a crime that otherwise would not have been committed. Again, we do not claim that this fact would excuse a constitutional violation: the point is that there will be parties who will not submit papers on a modification motion but whose interests the District Court should consider. See generally Heath v. DeCourcy, supra, 888 F2d at 1110; Plyler v. Evatt, supra, 846 F2d at 211-14; Duran v. Elrod, 760 F2d 756, 759, 760-61 (7th Cir, 1985). And the public interest is implicated, by definition, by every injunction in a class-action civil rights case.



It may be argued that the standard we propose, that modification will lie, in the discretion of the District Court, whenever there is a material change of fact or law or experience provides a better understanding of the best way to remedy the violation, is too flexible. However, the fact that the standard is a flexible one does not mean that modification will be too freely granted. For example, in Benjamin v. Malcolm, 564 F Supp 668 (SDNY, 1983), the City moved for an increase in the population caps at two facilities for detainees. The District Court noted that changes of fact and law are to be viewed "'with generosity,'" id. at 686 (quoting New York State Association for Retarded Children v. Carey, supra, 706 F2d at 971), but denied the motion.

Moreover, the flexibility of such a standard is mandated by the very nature of equitable relief. Every injunction involves



an element of prediction, at least a prediction that the injunction will remedy the violation. See Philadelphia Welfare Rights Organization v. Shapp, 602 F2d 1114, 1120 (3d Cir, 1979), cert. denied, 444 US 1026 (1980). No one would suggest that the District Court must stand by that prediction no matter what the future reveals. To the contrary, every time a District Court is asked to modify an injunction it should consider all the relevant facts and circumstances and justify, at least to itself, the continuation of the injunction's intrusion into the affairs of the parties and of the injunction's effect on parties not before the Court. System Federation No. 91 v. Wright, supra, 364 US at 649.

POINT II

SEVERAL ARGUMENTS THAT PLAINTIFFS OFTEN RAISE IN OPPOSITION TO MODIFICATION REQUESTS DO NOT WITHSTAND ANALYSIS.

(A)

Respondents can be expected to argue that modification should be more difficult for defendants to obtain when the injunction is the product of a consent decree rather than litigation. But this Court has held that the showing required is identical, System Federation No. 9 v. Wright, *supra*, 364 US at 650-51; United States v. Swift & Co., *supra*, 286 US at 114-15, and that holding undoubtedly is correct. A consent decree in a federal class-action civil rights case is "no mere contract." Duran v. Elrod, *supra*, 760 F2d at 760. As this Court has stated, the parties may not, by giving each other consideration, purchase an injunction from the District Court. System Federation No. 9

v. Wright, supra, 364 US at 651. And once a consent decree is entered, the plaintiffs may not exercise "veto power" over a defendant's request for modification based on changed law or facts or a better understanding of how to remedy the violation at issue. It is the District Court who must weigh the circumstances, including the interests of third parties and the public, and decide whether the injunction should continue as entered or be modified.

Moreover, if it is more difficult for defendants to obtain modification of consent decrees than of litigated injunctions, defendants will have a substantial incentive not to enter into consent decrees. But everyone seems to agree that, as a general matter, consent decrees are a good thing: they not only spare the parties and the District Court the time and expense of a trial, or at least a hearing on the remedy,

but also they permit the parties to choose the remedy from the many possible remedies for the violation found. Thus, if the standard for modification of consent decrees is too strict, defendants will forego the opportunity to negotiate a solution that minimizes the remedy's cost to them and interference with their operation and plaintiffs would be deprived of the opportunity to bargain for the remedy they most desire.

Therefore, the fact that a particular injunction was the product of consent and not of litigation is merely one circumstance to be considered on a defendant's motion for modification. Certainly, defendants may not sign a consent decree and seek modification as soon as the ink is dry. And plaintiffs will not fail to call to the attention of the District Courts the fact that the defendant agreed to the obligation it seeks to modify.

To the contrary, the more probable danger is that the District Courts will give too much weight to this circumstance. That happened here: the District Court's analysis under the "flexible" standard and under subsection 6 of Rule 60(b) mentions no circumstance other than the fact that the Sheriff had agreed to single-celling (App. 12a-13a). See also System Federation No. 91 v. Wright, supra, 364 US at 645-46 (District Court denied modification primarily because injunction had been entered on consent; Court of Appeals affirmed; this Court reversed); Plyler v. Evatt, supra, 846 F2d at 212.

(B)

Respondents also can be expected to argue that plaintiffs will not enter into consent decrees if it is too easy for defendants to obtain modification. The short answer to this argument is that defendants

will not enter into consent decrees if it is too difficult for defendants to obtain modification when material facts or law change or experience yields a better understanding of how to remedy the violation at issue. Duran v. Elrod, supra, 760 F2d at 762; Philadelphia Welfare Rights Organization v. Shapp, supra, 602 F2d at 1120. Resolution of these arguments is simple: if the standard for modification is known in advance, both plaintiffs and defendants can intelligently choose whether to settle or litigate.

(C)

Respondents probably will argue also that the Sheriff's "good faith," and the question of whether the increase in the number of detainees was "foreseeable," are relevant to this motion. But no one can see into the future and every injunction is addressed to the facts and law existing at

the time of its issuance. System Federation No. 91 v. Wright, supra, 364 US at 652; United States v. Swift & Co., supra, 286 US at 115. It is true that any change in law or fact that was contemplated at the time the injunction was issued will not, in the usual case, constitute grounds for modification. However, when the changed circumstance was not contemplated, we submit that the questions of whether the defendant acted in "good faith," and whether the change was "foreseeable," are of little significance. Modification may be appropriate even where it could be argued that the defendant made a mistake about the facts or failed to foresee something that should have been foreseen.

Again, New York State Association for Retarded Children v. Carey, supra, 706 F2d 956, provides a fine example. It could have been argued that the State should have foreseen that because of the New York City

housing market the cost of the smaller facilities would be prohibitive and thus the State's agreement to smaller facilities was mistaken. But the question of the State's mistake vel non paled in comparison to factors such as the prohibitive expense of smaller facilities, the need to empty Willowbrook, and the interests of third parties such as the families of the retarded children. In addition, given that the plaintiffs also signed the consent decree, it would seem that they were equally guilty of failing to foresee that smaller facilities would be prohibitively expensive.

Defendants such as public agencies should not be "punished" for failing to foresee some change; the interests of third parties always will be superior to a perceived need to "punish" a defendant. Duran v. Elrod, supra, 760 F2d at 762; Phildelphia Welfare Rights Organization v.

Shapp, supra, 602 F2d at 1121. Any punishment necessary can be dispensed through the contempt power.

Thus, the question should be whether the change was contemplated in fact and not whether, in hindsight, it was foreseeable. In all but the exceptional case the questions of whether the defendant acted in good faith and whether some change was foreseeable can only distract the parties and the District Court from the question of whether the modification sought would be better on the whole, considering the interests of the plaintiffs, the defendant, third parties and the public, than continuing the injunction without change.

(D)

Plaintiffs also may argue that modification should be granted only when the modification sought would further the purpose of the injunction. Upon analysis,

this argument is irrelevant. Certainly, if an obligation of an injunction comes to provide no benefit to the plaintiffs, there is no longer a reason for the District Court to interfere in the affairs of the defendant agency in that particular. See Procunier v. Martinez, 416 US 396, 404-05 (1974). Thus, modification should lie in that circumstance even though relieving the defendant of that obligation could not be said to further the purpose of the injunction.

Asking whether the proposed modification furthers the purpose of the injunction simply does not aid in deciding a defendant's motion for modification. If the injunction was the product of litigation, the purpose of the injunction was to remedy the violation without unnecessary burdens on the defendant, non-parties or the public. See Procunier v. Martinez, supra, 416 US at 404-05. If the proposed modification would

decrease the burden on the defendant without decreasing the injunction's effectiveness in curing the violation, or if the modification would increase the efficiency of the defendant's operation, thereby providing the defendant with more resources to apply to curing the violation in other ways, the District Court should not be foreclosed from granting modification simply because the modification would not by itself directly contribute to curing the violation. See generally Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986). Modification also should lie when it would decrease a burden on the public, such as the risk of victimization created if the injunction would result in the release of detainees or convicted criminals. See Heath v. DeCourcy, supra, 888 F2d at 1110; Plyler

v. Evatt, supra, 846 F2d at 211-14; Duran v. Elrod, supra, 760 F2d at 760-61.

If the injunction at issue was entered on consent, as it was here, it is meaningless to even speak of the purpose of the injunction. As this Court has stated, United States v. Armour & Co., 402 US 673, 681 (1971) (footnote omitted) (emphasis in original):

Thus [a consent] decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

The Courts below in this case made the mistake of attempting to consider the "purpose" of the consent decree. The District Court stated, "The proposed modification would violate one of the primary purposes of the decree -- to provide conditions of confinement for Suffolk County

pretrial detainees that meet agreed-upon standards" (App. 12a). This reasoning would mandate denial of every motion for modification of a consent decree. Plaintiffs were entitled to negotiate for single-celling in the New Jail but entering into a consent decree did not give them "veto power" over any request for modification of the resulting District Court injunction.

United Shoe and Dowell do state that Swift holds that an injunction may not be "changed" in the interests of the defendants if the purposes of the injunction have not been fully achieved. 364 US at 647-48; 111 S. Ct. at 636. However, both of those cases involved attempts to vacate, not modify, injunctions and those statements must be read in that context. Moreover, if taken literally, that holding would mean that no modification could ever be made because once an injunction's purpose has been fully

achieved, there no longer is a reason for the District Court to retain jurisdiction over the case.

CONCLUSION

THIS COURT SHOULD HOLD THAT MODIFICATION OF A PERMANENT INJUNCTION IN A FEDERAL CIVIL RIGHTS CLASS ACTION WILL LIE, IN THE DISTRICT COURT'S DISCRETION, WHENEVER THERE HAS BEEN A MATERIAL CHANGE OF LAW OR FACT OR EXPERIENCE WITH THE FACTS HAS PROVIDED THE COURT WITH A BETTER UNDERSTANDING OF HOW TO REMEDY THE VIOLATION ADDRESSED. THIS COURT SHOULD THEN REVERSE THE COURT OF APPEALS' ORDER AND REMAND FOR FURTHER PROCEEDINGS.

Respectfully submitted,

VICTOR A. KOVNER,
Corporation Counsel of
The City of New York,
Attorney for Amicus Curiae
The City of New York.

LEONARD J. KOERNER,*
FAY LEOUSSIS,
TIMOTHY J. O'SHAUGHNESSY,
-of Counsel.

*Counsel of Record.

APR 12 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE

MICHAEL J. ASHE, JR., Sheriff of Hampden County,
HARRY E. CLUTE, Sheriff of Nantucket County,
JOHN F. DeMELLO, Sheriff of Barnstable County,
JOHN M. FLYNN, Sheriff of Worcester County,
PETER Y. FLYNN, Sheriff of Plymouth County,
ROBERT J. GARVEY, Sheriff of Hampshire County,
CHRISTOPHER S. LOOK, JR., Sheriff of Dukes County,
CLIFFORD H. MARSHALL, Sheriff of Norfolk County,
CARMEN C. MASSIMIANO, JR., Sheriff of Berkshire County,
JOHN P. McGONIGLE, Sheriff of Middlesex County,
DONALD J. McQUADE, Sheriff of Franklin County,
DAVID R. NELSON, Sheriff of Bristol County,
CHARLES H. REARDON, Sheriff of Essex County,

Filed in Support of the Petitioner
ROBERT C. RUFO, Sheriff of Suffolk County.

EDWARD J. McDONOUGH, JR.
EGAN, FLANAGAN AND COHEN, P.C.
67 Market Street—P.O. Box 9035
Springfield, Massachusetts 01102
(413) 737-0260
Counsel for Amici Curiae



TABLE OF CONTENTS

THE INTEREST OF THE MASSACHUSETTS SHERIFFS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Public Interest at Stake — Despite Recent Prison Construction in Massachusetts, Its Sheriffs Continue to Face a Shortage of Prison Beds	5
II. Amici Urge the Court to Reject the Stringent <i>Swift</i> Standard for Modification Requests in Institutional Reform Cases	11
III. Amici Urge the Court to Reject the Particular Standard Applied by the District Court and the First Circuit Which Essentially Applied Contract Prin- ciples to the Petitioner's Request for Modifica- tion	13
IV. Amici Urge the Court to Adopt a Flexible Standard to be Applied to Requests to Modify Consent De- crees in Institutional Reform Litigation	15
V. Amici Urge the Court to Grant the Petitioner's Re- quested Modification Under a Flexible Standard	18
CONCLUSION	19
ADDENDUM A	21

TABLE OF AUTHORITIES

<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	12,16, 17,18
<i>Brewster v. Dukakis</i> , 675 F.2d 1 (1st Cir. 1982)	15
<i>Brown v. Ashe</i> , C.A. No. 81-0280-F (D. Mass.)	2n,3n,7n
<i>Doyle v. McGonigle</i> , C.A. No. 89-1519 (D. Mass.)	2n
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985)	13
<i>Heath v. DeCourcy</i> , 888 F.2d 1105 (6th Cir. 1989)	15,16
<i>Libby v. Marshall</i> , 653 F.Supp. 359 (D.Mass. 1986)	10
<i>Libby v. Marshall</i> , C.A. No. 83-2281-S (D.Mass.)	2n
<i>Massachusetts Association of Retarded Citizens v.</i> <i>King</i> , 668 F.2d 602 (1st Cir. 1981)	14
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	12,17
<i>Nelson v. Collins</i> , 659 F.2d 420 (4th Cir. 1981)	15,16
<i>New York State Association for Retarded Children v.</i> <i>Carey</i> , 706 F.2d 956 (2d Cir. 1983)	13,14, 16,18
<i>Newman v. Graddick</i> , 740 F.2d 1513 (11th Cir. 1984)	16
<i>Perry v. Fair</i> , C.A. No. 89-40031-XX (D.Mass.)	2n,9
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir.), <i>cert. denied</i> , 488 U.S. 897 (1988)	15,16,18
<i>Oklahoma City v. Dowell</i> , — U.S. —, 111 S.Ct. 630 (1991)	17
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	12
<i>Sheriff of Hampden County v. Secretary of Public</i> <i>Safety</i> , Hampden County Superior Court, C.A. No. 90-334; Time Magazine Mar. 5, 1990, pp. 18-19	7n

TABLE OF AUTHORITIES (cont.)

<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961)	13,16
<i>Tucker v. Reardon</i> , C.A. No. 87-0110-S (D.Mass.) .	2n
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932) .	4,5, 11,12,13 <i>et seq.</i>

THE INTEREST OF THE MASSACHUSETTS SHERIFFS

This brief as *amici curiae* is submitted on behalf of the Sheriff of Hampden County, Michael J. Ashe, Jr., and the duly elected Massachusetts sheriffs from Middlesex County, John P. McGonigle, Norfolk County, Clifford H. Marshall, Worcester County, John M. Flynn, Franklin County, Donald J. McQuade, Barnstable County, John F. DeMello, Hampshire County, Robert J. Garvey, Berkshire County, Carmen C. Massimiano, Jr., Plymouth County, Peter Y. Flynn, Dukes County, Christopher S. Look, Jr., Bristol County, David R. Nelson, Essex County, Charles H. Reardon, and Nantucket County, Harry E. Clute ("Amici" or "Massachusetts sheriffs"). Amici represent thirteen of the fourteen counties which make up the Commonwealth of Massachusetts. This brief is offered in support of the petitioner, Robert C. Rufo, the sheriff from the remaining county in Massachusetts, Suffolk County, and is submitted with the filed written consent of the parties.

The Massachusetts sheriffs are acutely interested in the issues presented by this petition. The criminal justice system in Massachusetts consists of a comprehensive scheme of state prisons, and county jails and houses of correction. Convicted offenders serving felony sentences are incarcerated in a system of state prisons operated by the Commonwealth. Thirteen of the fourteen¹ Massachusetts counties operate jails for pretrial detainees and houses of correction for offenders serving misdemeanor sentences of two and a half years or less.

The Massachusetts sheriffs are directly affected by the District Court's order which compels single-cell occupancy in the Suffolk County Jail. The Massachusetts sheriffs have held Suffolk County pretrial detainees in their own county facilities

¹ Nantucket County has no jail or house of correction. Detainees and misdemeanor offenders from Nantucket are incarcerated in the Barnstable Jail and House of Correction.

on a voluntary basis as one means to assist Sheriff Rufo in complying with the District Court's order (First Circuit Appendix ("FCA") 296-297). Initially, inmates from Suffolk County were transferred to counties adjacent to or near Suffolk County, namely Essex, Hampden, Middlesex, Norfolk and Worcester Counties. Those counties, however, became subject to prison population orders imposed by federal or state courts and, as a result, Sheriff Rufo began transferring pretrial detainees to more distant counties in western Massachusetts. Although the District Court's order prohibited Sheriff Rufo from double-celling Suffolk County detainees, the transferred pretrial detainees were in many instances double and triple-celled by the Massachusetts sheriffs who voluntarily accepted the transferees into their facilities.

Even if the Massachusetts sheriffs were not directly affected by the District Court's single occupancy order, they share the concerns of Sheriff Rufo as prison administrators. Massachusetts, like most states, remains in the throes of the prison population crisis. Five of the Massachusetts sheriffs who join in this brief are operating their facilities under prison population orders.²

The Massachusetts sheriffs are obligated by state law to incarcerate pretrial detainees and sentenced offenders remanded to their custody by the state courts. On the other hand, they risk contempt of court charges if they fail to abide by prison population court orders. When a new prison is planned and constructed, the administrators make their best judgment

² Those counties, other than Suffolk, whose jails and houses of correction are subject to population orders are Hampden [*Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.)], Worcester [*Perry v. Fair*, C.A. No. 89-40031-XX (D.Mass.)], Essex [*Tucker v. Reardon*, C.A. No. 87-0110-S (D.Mass.)], Norfolk [*Libby v. Marshall*, C.A. No. 83-2281-S (D.Mass.)], and Middlesex [*Doyle v. McGonigle*, C.A. No. 89-1519 (D.Mass.)]. Four of the orders mandate early release of sentenced offenders in order to comply with population limitation provisions. Under these orders, there have been 7,153 prisoners released prematurely (see Addendum A to the Brief).

as to the needs of the criminal justice system in the community. The same judgment is called for when a prison administrator decides to enter into a consent decree as a means of terminating litigation. When the future needs of a community's criminal justice system are either unforeseeable, or inaccurately predicted, flexibility is required in the administration of consent decrees governing local prisons if the public interest is to be served. In order to serve the public interest, double-celling is, or has been, utilized to some extent in all of the counties, except where prohibited by court order.³

It is thus apparent that the Massachusetts sheriffs who are administrators of county jails and houses of correction are vitally interested in the issues involved in this case. The Massachusetts sheriffs who are now not operating under consent decrees, but who may face the decision of entering into such a decree given the worsening prison population crisis, have an interest in the standards under which modification requests will be judged. As parties or potential parties to consent decrees, the Massachusetts sheriffs become more than parties to a contract. They remain elected guardians of the public interest. If it can be demonstrated that a consent decree, because of unforeseeable circumstances or factors beyond anyone's control, no longer strikes an appropriate balance between the interest of public safety and the interest in preserving prisoners' rights, a flexible approach should be applied to requests for

³ Court orders presently prohibit double-celling in the Middlesex County Jail and the Worcester County Jail and House of Correction.

In the respondents' brief in opposition to Sheriff Rufo's petition for certiorari, respondents inaccurately represented that amicus Ashe had entered into a consent decree mandating single cell occupancy for the Hampden County Jail and House of Correction (Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 24, n. 11). On the contrary, the decision of the court in *Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.), recognized and accepted amicus' practice of double-celling when necessary. The consent decree referred to by respondents dated July 26, 1990 does not prohibit double or triple bunking, but rather, restricts it to tiers of cells located on the ground floor of the cell block.

modifications. The District Court's refusal to consider the public safety interest, and its application of contractual principles to Sheriff Rufo's request for modification are fatal flaws in its decision denying the modification.

This brief urges the rejection of the "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), to requests to modify consent decrees governing jails and prisons, and urges the adoption of the "flexible standard" discussed by the majority of the Circuit Courts of Appeals. The District Court denied Sheriff Rufo's requested modification on the grounds that it would violate "agreed-upon standards". (Sheriff's Cert. Pet. at 12a). The District Court applied contractual principles to Sheriff Rufo's request, which is a standard even more strict than the "grievous wrong" standard enunciated in *Swift*, and its approach should be rejected by this Court.

SUMMARY OF ARGUMENT

This case presents issues which directly impact the public interest in incarcerating pretrial and sentenced offenders who have been remanded by the courts to the custody of prison administrators. Massachusetts, despite recent prison construction, still faces a shortage of prison beds, in part, because of unforeseen increases in pretrial detainee and sentenced offender populations.

Amici, the sheriffs from Massachusetts, share the problems in prison administration experienced by the petitioner, Sheriff Rufo of Suffolk County. The practice of double-celling is prevalent in all but one Massachusetts county, and five amici are operating their institutions under court population orders.

The application of a strict "grievous wrong" standard enunciated in *United States v. Swift*, 286 U.S. 106, 115 (1932), to institutional reform consent decrees, fails to adequately take

into account the public safety interest which may be threatened by unforeseen changes in local criminal justice systems. Inmate population projections relied on when new facilities are planned, and prevalent when administrators decide to enter into consent decrees have been proved inaccurate, and the public interest has suffered as a result.

The District Court applied contractual principles to Sheriff Rufo's modification request, rejecting it because, in the District Court's view, "agreed-upon standards" would be violated by the modification. This approach was contrary, not only to the "flexible approach" discussed by several courts in institutional reform consent decrees, but also to *United States v. Swift*, 286 U.S. 106, 115 (1932), which characterized a consent decree as "a judicial act" rather than a contract between private parties.

The Massachusetts Sheriffs urge the Supreme Court to adopt the flexible approach to consent decree modification requests proposed by Sheriff Rufo. A flexible standard allows for the protection of the public interest which becomes threatened when prison populations exceed expectations, while still preserving the essence of the prison consent decrees which is to maintain current constitutional standards for pretrial detainees and sentenced offenders.

ARGUMENT

I. The Public Interest at Stake — Despite Recent Prison Construction in Massachusetts, Its Sheriffs Continue to Face a Shortage of Prison Beds.

New county jails and houses of correction have been completed, or in the process of construction, in the Massachusetts counties of Suffolk, Essex, Worcester, Norfolk, and Hampden. Regrettably, past projections about prison population in all of

the Massachusetts counties have proved to be inaccurate. As a result, even those sheriffs with new facilities still deal with fewer cells than prisoners remanded to their custody. A profile of each sheriff's situation illustrates the compelling public safety interest at stake.

(1) Hampden County

Amicus, Michael J. Ashe, Jr., Sheriff of Hampden County, has endured perhaps the worst population crisis in any of the Massachusetts counties. With a rated capacity of 302 inmates, the Hampden County Jail and House of Correction held 724 inmates on October 24, 1988 (FCA 439). On that day, amicus entered into a consent order which capped the population at 500 inmates, with a subcap of 370 sentenced offenders and 130 pretrial detainees. Under the order, amicus was directed to grant early release credits in order to maintain the 370 inmate cap on the sentenced population, and was ordered to refuse admission of any pretrial detainee whose presence resulted in a violation of the 130 inmate cap on the pretrial population (FCA 440-444). The consent order was based upon the parties' best estimates as to the relative need for sentenced and pretrial beds. The consent order subcap of 130 pretrial beds soon proved to be totally unworkable. Amicus moved the District Court to modify the consent order, offering evidence that a minimum of 200 pretrial beds were needed by the state court judges sitting in Hampden County. The plaintiff class of inmates opposed the requested modification claiming that there had been no change in circumstances. The District Court took evidence, not only from the parties, but from the Chief Justice of the State Superior Court, which court was responsible for remanding pretrial detainees to amicus' custody. On February 21, 1989, the District Court granted amicus' requested modification and increased the pretrial population cap to 200 (FCA 453-454). Amicus' modification was granted, in part, because

the evidence generated by the experience of operating under the consent decree was "obviously not available at the time the original order was entered", and because the court had the benefit of the evidence offered by the state judiciary, which, although not a party, was directly affected by the consent decree (FCA 449).

Amicus' experience presents an excellent example of the need for a flexible approach toward motions to modify consent decrees. Amicus' request to modify the consent decree to increase the pretrial population cap was justified, first, because the parties' good faith predictions as to the required number of pretrial beds simply proved inaccurate. Secondly, the District Court found that the change had "minimal, if any, constitutional significance" (FCA 448). The District Court considering amicus' request for modification acknowledged that the practice of double-celling would continue under the consent decree as modified⁴ (FCA 448). Amicus will continue to operate under the February 21, 1989 modification of the consent order until construction is completed for the new Hampden County Jail and House of Correction in Ludlow, Massachusetts. Regrettably and unavoidably, during the pendency of the court's population order, amicus has been forced to release 3,556 inmates who have completed one-third or less of their imposed sentences.⁵

⁴The plaintiffs and amici did agree to restrict double-celling to the floor level tier cells on July 26, 1990. *Brown v. Ashe*, C.A. No. 81-0280-F (D.Mass.).

⁵On February 16, 1990, amicus took unprecedented action to reduce the number of early releases when he occupied a National Guard Armory in Springfield, Massachusetts for use as a prison for sentenced offenders. Amicus' action provided sorely needed prison space in Hampden County, and also served to focus wide-spread attention on the problem of prison overcrowding. (See *Sheriff of Hampden County v. Secretary of Public Safety*, Hampden County Superior Court, C.A. No. 90-334; *Time Magazine*, Mar. 5, 1990, pp. 18-19.)

(2) Barnstable County

The Barnstable County Jail and House of Correction is not operating under any court population order. The facility contains 40 cells measuring 6.5' x 8', all of which are used for double-celling. The inmates spend an average of 8 hours per day out of their cells. The average population of the facility is 152, which includes the double-celled inmates. In 1989, in order to assist the petitioner Sheriff Rufo to comply with the District Court's single-cell occupancy order, Barnstable housed an average of 4 Suffolk County pretrial detainees in double-cells during a 45 day period. The Barnstable facility also houses pretrial detainees and misdemeanor offenders from Nantucket County which has no jail or house of correction (FCA 798-800).

(3) Berkshire County

The Berkshire County Jail and House of Correction is not operating under a court population order. The facility contains 113 cells which measure 6' x 8', 30 of which are used for double-celling. The average population of the facility is 160 inmates who spend an average of 11 hours per day out of their cells. During the same 45 day period in 1989, the Berkshire facility held an average of 8 Suffolk County pretrial detainees in double-cells in order to assist Sheriff Rufo to comply with the District Court's single-cell occupancy order (FCA 801-803).

(4) Bristol County

The Bristol County Jail and House of Correction is not operating under a court population order. The facility contains 236 cells which measure 7' x 7' which are used for double-celling an average jail inmate population of 420 inmates. The inmates here spend a total of 5½ hours per day out of their cells. During the same 45 day period in 1989, the Bristol facility

housed an average of 13 pretrial detainees from Suffolk County in double-cells in order to assist Sheriff Rufo to comply with the District Court's single-cell occupancy order (FCA 804-805).

(5) Essex County

A new Essex County Jail and House of Correction was completed in 1990 with an inmate capacity of 500 inmates. The new facility is already at capacity and is not operating under a court population order. (The Sheriff anticipates the need for 110 double cells.) The old Essex Jail located in Salem, Massachusetts, operated under a court population cap of 162 inmates and contained 16 double-cells which were 70 square foot size (FCA 807-808).

(6) Plymouth County

The Plymouth County Jail and House of Correction is not operating under a court population order. The facility contains 140 cells which measure 6'6" x 7'6", all of which are used for double-celling inmates. The average population of the facility is 470 inmates. The inmates incarcerated in cells spend a total of 6 hours a day out of the cells. During the first 45 days of 1989, the Plymouth facility held an average 67 Suffolk County pretrial detainees in double-cells in order to assist Sheriff Rufo in complying with the District Court's single-cell occupancy order.

(7) Worcester County

The Worcester County Jail and House of Correction is operating under a court population order [*Perry v. Fair*, C.A. No. 89-40031-XX (D.Mass.)]. The average population of the facility is 641 inmates. The cells measure either 9' x 6'3" or 10' x 8', and 136 are used for double-celling. In 1989, the Worcester facility held an average of 8 Suffolk County pretrial detainees for 45 days in double-cells (FCA 118-119).

(8) Norfolk County

The Norfolk County Jail and House of Correction operates under a court population order [*Libby v. Marshall*, 653 F.Supp. 359 (D.Mass. 1986)], which caps the population at 200 inmates. Sheriff Marshall has released 1,034 inmates prematurely under the court order. A new Norfolk County Jail and House of Correction is under construction and is expected to be complete in 1992 (FCA 464-468).

(9) Franklin County

The Franklin County Jail and House of Correction is not operating under a court population order. The facility has 61 cells, 29 of which are used for double-celling. The cells are 48 square feet. During 1988 and 1989, the population surged from a low of 54 to a high of 89 (FCA 478-479).

(10) Dukes County

The Dukes County Jail and House of Correction is not operating under a court population order. The facility has 18 cells which contain 60 square feet, 6 of which are used for double-celling (FCA 485).

(11) Hampshire County

The Hampshire County Jail and House of Correction is not operating under a court population order. The facility was constructed in 1984, and has a rated capacity of 248. Among the living areas are 144 single occupancy cells. Although no cells are presently used for double-celling, during periods of overcrowding, inmates have been housed in medical rooms, holding cells, jail interview rooms, and visiting rooms (FCA 474-475).

(12) Middlesex County

The Middlesex County Jail (Cambridge) is operating under a court population order which limits the pretrial detainee

population at 200 and which prohibits double-celling. The Middlesex House of Correction (Billerica) has 218 cells measuring 49 square feet, 181 of which are used for double-celling (FCA 458-459, 814-815).

Amici submit that the threat of public safety in Massachusetts is starkly demonstrated by the shortage of prison beds faced by the Massachusetts sheriffs. The Court should adopt a flexible approach to consent decree modification requests which requires lower courts to give substantial weight to the public interest.

II. Amici Urge the Court to Reject the Stringent *Swift* Standard for Modification Requests in Institutional Reform Cases.

In *United States v. Swift*, 286 U.S. 106 (1932), the Supreme Court enunciated a standard to be applied to a consent decree modification proposed by a private party which had engaged in behavior harmful to the public interest. The harmful behavior in *Swift* was anticompetitive behavior violative of antitrust policy, and the Supreme Court concluded that the consent decree was "substantially impervious to change" because of the need to protect the public interest from such future behavior. *Swift*, 286 U.S. at 114. In this context, the Court applied a stringent standard to the private party seeking a modification, stating:

Nothing less than clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Swift, 286 U.S. at 119.

Notwithstanding the stringent "grievous wrong" standard applied to the private party seeking to modify the consent decree in *Swift*, the Supreme Court did not foreclose the development of a more flexible standard in appropriate cases. The *Swift* court drew a distinction between decrees such as the one before it, which gave protection to rights fully accrued upon facts so nearly permanent as to be "substantially impervious to change", and consent decrees which "involved the supervision of *changing conduct or conditions* and are thus provisional and tentative". *Swift*, 286 U.S. at 114 (emphasis supplied).

Consent decrees which govern prisons clearly fall into the latter category described by the *Swift* court, and amici urge the Court to enunciate and apply a more flexible standard to Sheriff Rufo's proposal for modification. The argument that a stringent standard should be applied to motions to modify consent decrees in "institutional reform litigation" is at odds with long standing precedent requiring federal courts to defer to the judgment of state and local elected officials, and skilled professionals, when determining the particular manner in which to administer a public institution consistent with individual constitutional rights. See *Milliken v. Bradley*, 433 U.S. 267, 281 (1977); *Rhodes v. Chapman*, 452 U.S. 337, 351 (1981) (judicial deference to the judgments of experienced professionals is appropriate in administering complex institutions such as prisons); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979).

The District Court and the First Circuit failed to recognize that the consent decree governing the Suffolk County Jail regulated "changing conduct or conditions" and was "thus provisional and tentative". *Swift*, 286 U.S. at 114. While purporting to apply a more flexible standard to the Sheriff's request to modify, the District Court erroneously applied a stringent standard which failed to take into account the legitimate interests of the unrepresented public.

III. Amici Urge the Court to Reject the Particular Standard Applied by the District Court and the First Circuit Which Essentially Applied Contract Principles to the Petitioner's Request for Modification.

In *Swift*, the Supreme Court held that a consent decree was "a judicial act", and was unlike a contract whereby the parties might irrevocably abandon any right to seek modifications to adapt the decree to changed circumstances or conditions. *Swift*, 286 U.S. at 115.

While claiming to apply a "flexible standard", in reality, the District Court applied contractual principles to the Sheriff's request for modification. The District Court held that Sheriff Rufo's request failed to meet the legal requirements for modification because it would violate one of the primary purposes of the consent decree, which provided conditions of confinement for prisoners which "meet agreed-upon standards" (Sheriff's Cert. Pet. at 13a). The particular agreed upon standard identified by the District Court was single-cell occupancy. The District Court deemed it unnecessary to consider the interest of public safety as a factor in its decision (Sheriff's Cert. Pet. at 12a).

The District Court's logic was circular. In essence, it held that Sheriff Rufo could not seek to modify aspects of an agreed decree because the proposed modification would violate what the District Court felt was "agreed-upon" by the parties. The District Court's reasoning was in derogation of the principle that a consent decree must not be treated as a contract. *System Federation No. 91 v. Wright*, 364 U.S. 642, 651, 660 (1961); *Duran v. Elrod*, 760 F.2d 756, 760 (7th Cir. 1985) (court may not rely on the "sanctity of contracts" in deciding whether to modify a consent decree governing a prison, but rather must consider the impact of the modification on the public interest); *New York State Association for Retarded Children v. Carey*,

706 F.2d 956, 971 (2d Cir. 1983) (defendants who operated a mental institution were not foreclosed from seeking changes in a consent decree based upon changed conditions).

By simply holding Sheriff Rufo to what the District Court considered to be the "agreed-upon standards" of his predecessor and the plaintiff class, the First Circuit departed from its own view as to the responsibility of courts in overseeing the implementation of consent decrees mandating institutional reform. *Massachusetts Association of Retarded Citizens v. King*, 668 F.2d 602 (1st Cir. 1981). In *King*, the First Circuit stated:

Programatic decrees in public law litigation may call for somewhat more flexible interpretation in light of the need to achieve their basic purposes (the eradication of unconstitutional conditions) and the need to accommodate the differing competences of different branches of government as well as the differing needs and interests of the parties.

668 F.2d at 607-608.

By failing to consider the threat to public safety posed by the pretrial detainees who would be released as a result of the denial of Sheriff Rufo's requested modification, the District Court and the First Circuit refused to make any accommodation for the competences of other branches of government, and instead looked only to what it perceived that the parties had "agreed-upon".

By applying contractual principles to Sheriff Rufo's modification request, the courts below applied a standard even more stringent than the "grievous wrong" standard applied by the Supreme Court in *Swift* to a modification requested by a private party. *Swift*, 286 U.S. at 119.

IV. Amici Urge the Court to Adopt A Flexible Standard to be Applied to Requests to Modify Consent Decrees in Institutional Reform Litigation.

The critical distinction between consent decrees between private litigants and those involving elected and appointed public officials is that the latter directly involve the public interest. *Plyler v. Evatt*, 846 F.2d 208, 211 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988). If the public interest is to be afforded appropriate weight by courts considering modification requests, a more flexible standard of review is required than that applied in *Swift*. That flexible standard, in the context of prison reform litigation, must balance the risks to the public against the threat to the constitutional rights of prisoners. *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989).

The Circuit Courts of Appeals have recognized that a consideration of the public interest requires a flexible approach to requests to modify consent decrees. The First Circuit has stated that the implementation of a consent decree, in certain circumstances, may require "the parties continually to reassess their respective rights and obligations under the decree as the circumstances . . . evolve". *Brewster v. Dukakis*, 675 F.2d 1, 5 (1st Cir. 1982) (change of circumstance was lack of funding). In *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981), an increase in prison population was deemed to be a sufficient change in circumstances to allow a consent decree to be modified to allow double-celling. A similar result was reached in *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988).

A public official who is party to a consent decree should be afforded an opportunity to fine-tune that decree when a change in circumstances calls for a rebalancing of the public interest and the individual rights at issue. *Heath v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989). Even if the public official

should have foreseen the change in circumstances, that factor will not bar a modification request if it is in the public interest. In *Heath*, the Sixth Circuit granted the defendant's request for a modification even though the defendant Sheriff knew or should have known that the agreed jail population limit was too low. 888 F.2d at 1107 n. 2.

A change or clarification in the applicable law governing public institutions has been held to warrant a modification of a consent decree. The Fourth and Eleventh Circuits have applied flexible standards to modification requests based upon clarification of constitutional standards regarding the administration of prisons. *Plyler v. Evatt*, 846 F.2d 208, 215 (4th Cir.), cert. denied, 488 U.S. 897 (1988); *Nelson v. Collins*, 659 F.2d 420, 424-427 (4th Cir. 1981); *Newman v. Graddick*, 740 F.2d 1513 (11th Cir. 1984).

The District Court and the First Circuit failed to consider the clarification of prisoners' constitutional rights enunciated in *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Supreme Court held that the Constitution did not prohibit double-celling pretrial detainees. The District Court, however, erroneously held that even if Sheriff Rufo's proposed use of double-celling complied with constitutional standards, that factor did not "provide a basis for relief from a consent decree" (Sheriff's Cert. Pet. at 12a). That inflexible approach is at odds with *System Federation No. 91 v. Wright*, 364 U.S. 642, 660 (1961), where this Court permitted a modification of a consent decree based upon an amendment to the statute (the Railway Labor Act) which formed the basis of the consent decree. A court "must be free to modify the terms of a consent decree when a change in the law brings those terms in conflict with statutory objectives". *Wright* at 651; *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 971 (2d Cir. 1983) (applying the reasoning in *Wright* to a change in constitutional interpretation stating, "we can see no reason for a different

view when the requirement is constitutional and a subsequent decision of the court has made clear that the court entering the decree interpreted the requirement too broadly”).

The District Court and the First Circuit’s refusal to allow a clarification in constitutional interpretation to form the basis of a request to modify a consent decree is also at odds with the principle that a judicial remedy intended to eliminate an unconstitutional condition should not go beyond constitutional requirements. This principle was applied in *Oklahoma City v. Dowell*, ___ U.S. ___, 111 S.Ct. 630 (1991), where a request to dissolve an injunction entered in a school desegregation case was allowed because the unlawful conduct of the public officials had come to an end, and was unlikely to be resumed. See also *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (decree must be remedial so as to put those persons whose rights had been violated in the position they would have occupied had there been no violation). In *Milliken*, the Supreme Court noted that court imposed remedies exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation, and that a court must take into account the interest of state and local governments in managing their own affairs. *Id.* at 282.

The District Court erred when it refused to even consider the evolution of constitutional law on the question of double-celling. The consent decree governing the Suffolk County Jail states the parties’ desire to “fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees” (Sheriff’s Cert. Pet. at 15a).

The decree itself nowhere mentions single-celling. The new Suffolk County Jail is one of the most modern facilities of its kind. Double-celling a limited number of pretrial detainees there will not create an unconstitutional condition in light of the Supreme Court’s ruling in *Bell v. Wolfish*, *supra*.

The construction of a new Suffolk County Jail, which complies with constitutional standards, was the essence of the parties' consent decree. A factor considered by courts when passing on requests for modification is whether the requested change would defeat the fundamental purpose of the consent decree. *Carey*, 706 F.2d at 969 (modification granted because it was consistent with goal of closing a state run institution). *Plyler v. Evatt*, 846 F.2d at 212 (modification granted where prisoners would receive the "essence of their bargain" which was compliance with constitutional jail standards).

The "essence" of the bargain received by the pretrial detainees of Suffolk County was, as in *Plyler*, a jail which met constitutional standards. The Sheriff has constructed a jail which contains space and amenities which are required by neither the Constitution nor the consent decree. The practice of double-celling is not prohibited by the language of the consent decree, nor is it prohibited by the Constitution. *Bell v. Wolfish*, 441 U.S. 520 (1979).

V. Amici Urge the Court to Grant the Petitioner's Requested Modification Under A Flexible Standard.

A consideration of the change in circumstances in Suffolk County, the clarifications in the constitutional standards for prison conditions, the public safety threat posed by releasing detainees committed to bail, and the essential purposes of this consent decree, require the granting of Sheriff Rufo's requested modification. The change in circumstances is a dramatic rise in the pretrial population in Suffolk County, beyond the number of cells constructed. A wooden adherence to a single occupancy requirement gives rise to a clear danger to public safety, since it will result in release on recognizance of persons who have been adjudicated as requiring bail. Releasing such individuals

defeats the legitimate public interest in ensuring that such individuals appear at trial.

Modifying the consent decree to provide for some amount of double-celling allows the Court to address this legitimate public interest, while at the same time adhering to the essence of the consent decree, which was to eliminate exposure of the inmate class "to unconstitutional conditions of pretrial confinement" (Sheriff's Cert. Pet. at 15a). Under a flexible standard, the modification requested by the Sheriff still provides the inmates with a fully constitutional jail, but also allows the Sheriff to serve the public interest by holding in his custody all pretrial detainees until they have appeared for trial, or have paid the bail which was set by the judicial branch of government.

CONCLUSION

The Massachusetts sheriffs urge that the decision below be reversed, and that the Court enter an order directing the allowance of the Sheriff of Suffolk County's motion to modify the consent decree.

Respectfully submitted,

EDWARD J. McDONOUGH, JR.
EGAN, FLANAGAN AND COHEN, P.C.
67 Market Street — P.O. Box 9035
Springfield, Massachusetts 01102
(413) 737-0260
Counsel for Amici Curiae

ADDENDUM A**MEMORANDUM TO THE NORFOLK COUNTY SHERIFF**

TO: Sheriff Clifford H. Marshall
 FROM: Deputy Supt. Peter Perrancello
 RE: Survey of County Facility Crowding Releases
 DATE: April 1, 1991

The following information illustrates the county releases (under federal and/or state court jurisdictions) that have been effected through 03/31/91.

<u>COUNTY</u>	<u>COURT CASE</u>	<u>FACILITY</u>	<u>METHOD OF RELEASE</u>	<u>RELEASE</u>
Hampden	Brown v. Ashe	Springfield York Street HOC & Jail	1. Sentence Credits Special Session Superior Court — day reporting	2806 750 <u>3556</u>
Middlesex	Richardson v. McGonigle	Cambridge Jail	1. Special Session Superior Court - halfway house - street - warrants	 553 401 267 <u>1221</u>
Norfolk	Libby v. Marshall	Dedham HOC & Jail	1. Special Master Release Plan - sentenced - pretrial - monitors	 610 101 323 <u>1034</u>
Worcester	Page v. Deignan	West Boylston Jail	1. Special Session Superior Court - releases	 <u>1101</u>
Total Premature Releases Under Federal/State Court Orders =				<u>6912</u>
Suffolk Cty Jail				+ <u>241</u>
(Chas St)				7153

APR 15 1991

IN THE
Supreme Court of the United States OF THE CLERK
OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,
v. *Petitioners,*

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
v. *Petitioner,*

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF OF THE
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
COUNCIL OF STATE GOVERNMENTS,
U.S. CONFERENCE OF MAYORS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES, AND
NATIONAL CONFERENCE OF STATE LEGISLATURES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

ZACHARY D. FASMAN
MARK L. GERCHICK
PAUL, HASTINGS, JANOFSKY
& WALKER
Twelfth Floor
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9000

RICHARD RUDA
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for
Amici Curiae

QUESTION PRESENTED

Whether good faith requests for modification of consent decrees in public institutional reform litigation should be considered under the "grievous wrong" standard, or under a "less burdensome alternative" standard that appropriately accommodates state and local interests while preserving the purposes of the decree.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT AND INTEREST OF <i>AMICI CURIAE</i>	2
ARGUMENT	4
I. REQUESTS TO MODIFY CONSENT DE- CREES IN PUBLIC INSTITUTIONAL RE- FORM LITIGATION SHOULD BE RE- VIEWED UNDER A STANDARD THAT AP- PROPRIATELY ACCOMMODATES STATE AND LOCAL INTERESTS	4
II. A REQUEST FOR MODIFICATION OF A CONSENT DECREE IN PUBLIC INSTITU- TIONAL REFORM LITIGATION SHOULD BE EVALUATED UNDER A "LESS BUR- DENSOME ALTERNATIVE" STANDARD....	9
A. An Appropriate Standard Must Allow for Deference to the Judgment of State and Local Officials	9
B. A Proposed "Less Burdensome Alternative" Standard	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	2, 5, 10, 12
<i>Board of Education of Oklahoma City Public Schools v. Dowell</i> , 111 S. Ct. 630 (1991)	<i>passim</i>
<i>Heath v. De Courey</i> , 888 F.2d 1105 (6th Cir. 1989)	3, 9, 10
<i>Local 93 v. City of Cleveland</i> , 478 U.S. 501 (1986)	3, 6, 7, 12
<i>Mayor of Philadelphia v. Educational Equality League</i> , 415 U.S. 605 (1974)	4
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	2, 3, 5, 6
<i>Nelson v. Collins</i> , 659 F.2d 420 (4th Cir. 1981)	10
<i>New York State Association For Retarded Children v. Carey</i> , 706 F.2d 956 (2d Cir.), <i>cert. denied</i> , 464 U.S. 915 (1983)	6, 8-9
<i>Philadelphia Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3d Cir. 1979), <i>cert. denied</i> , 444 U.S. 1026 (1980)	7, 8, 9, 10
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974)	5, 12
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	5, 10
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	4
<i>Thornburgh v. Abbott</i> , 490 U.S. 401 (1989)	5
<i>United States v. ITT Continental Baking Co.</i> , 420 U.S. 223 (1975)	12
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932)	<i>passim</i>
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	6

OTHER AUTHORITIES:

Chayes, <i>The Role of the Judge in Public Law Litigation</i> , 89 Harv. L. Rev. 1281 (1976)	8
1B J. Moore, J. Lucas & T. Currier, <i>Moore's Federal Practice</i> ¶ 0.409[5] (1991)	6
Note, <i>The Modification of Consent Decrees in Institutional Reform Litigation</i> , 99 Harv. L. Rev. 1020 (1986)	3, 8
<i>Restatement (Second) of Contracts</i> (1979)	12

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-954; 90-1004

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,
v. *Petitioners,*

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
v. *Petitioner,*

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**BRIEF OF THE
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
COUNCIL OF STATE GOVERNMENTS,
U.S. CONFERENCE OF MAYORS,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES, AND
NATIONAL CONFERENCE OF STATE LEGISLATURES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

The refusal of the court below to allow modification of a consent decree in this prison reform case absent “a clear showing of a grievous wrong evoked by new and unforeseen conditions,” see *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), raises serious constitutional concerns. The decision below also threatens to discourage the use of consent decrees in complex public institutional reform litigation. The Court has recognized repeatedly that such litigation requires the courts to “take into account the interests of state and local authorities in managing their own affairs” in order to avoid unnecessary federal court intrusion into state and local governance. See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977). Indeed, just three months ago the Court held that the *Swift* “grievous wrong” standard does not appropriately accommodate state and local interests in public institutional reform litigation, and thus cannot be the basis for determining whether a school desegregation decree should be dissolved or modified. See *Board of Education of Oklahoma City Public Schools v. Dowell*, 111 S.Ct. 630, 637 (1991).

This concern for accommodating state and local interests likewise should render the *Swift* standard inapplicable to the request of a state or local government to modify a consent decree in a prison reform case. Consent decrees, no less than litigated decrees, involve the federal courts in continuing and potentially intrusive supervision of state and local institutions. This federal authority, whether the product of initial consent or litigation, must be exercised within the boundaries inherent in our federal system. By refusing to permit a modification of a decree to allow “double-celling” of inmates—a practice that satisfies the Constitution, see *Bell v. Wolfish*, 441 U.S. 520 (1979)—the court below ignored this Court’s admonition that in exercising their equitable authority the federal

courts must accommodate state and local interests, "consistent with the Constitution." See *Milliken v. Bradley*, 433 U.S. at 280-81.

Rigid adherence to the original terms of a consent decree involving a public institution raises equally serious practical concerns. The Court has recognized the importance and utility of consent decrees as a means of resolving complex litigation without trial. See, e.g., *Local 93 v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986). A large number of institutional reform cases brought against state and local governments are resolved by consent decree. These decrees affect a broad range of local governmental functions, including the administration of schools, prisons, and hospitals.¹

These federal court decrees often are far-ranging, dynamic documents that may govern the administration of public institutions for decades. As this case illustrates, the circumstances that affect the operation of these decrees may change due to unforeseeable social, political or economic developments. Such changes compel government officials to seek modification of the decrees. Absent assurance that the federal courts will sympathetically consider the problems arising during the administration of consent decrees, state and local government officials will be deterred from entering into such decrees. Because *Dowell* prohibits the federal courts from applying the strict *Swift* standard to litigated decrees, affirmance of the decision below would create a substantial incentive for public officials to resolve disputes through protracted litigation rather than through consent decrees.

¹ See Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1020-21 (1986). For convenience, we refer to such cases generically as "public institutional reform litigation."

Different issues are presented by efforts to modify consent decrees in civil litigation not involving public institutional reform. See *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989).

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a vital interest in legal issues that affect the powers and responsibilities of state and local governments. We submit that the federal courts must approach the modification and administration of consent decrees in public institutional reform litigation with due regard for the special needs of state and local governments and the public on whose behalf they act. We offer this brief *amicus curiae* to propose an alternative to the *Swift* standard for use in public institutional reform cases and to urge the Court to adopt that standard and reverse the decision below.²

ARGUMENT

I. REQUESTS TO MODIFY CONSENT DECREES IN PUBLIC INSTITUTIONAL REFORM LITIGATION SHOULD BE REVIEWED UNDER A STANDARD THAT APPROPRIATELY ACCOMMODATES STATE AND LOCAL INTERESTS.

The exercise, in equity, of federal judicial authority in cases involving state and local institutions necessarily implicates “‘delicate issues of federal-state relationships.’” See *Rizzo v. Goode*, 423 U.S. 362, 380 (1976), quoting *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974). Litigation that seeks to compel changes in the administration of public institutions such as schools, prisons, or hospitals requires federal courts to accommodate state and local interests in the administration of those institutions. As the Court has recognized, such judicial accommodation is particularly difficult—and warrants particular restraint—in

² The parties’ letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

prison reform litigation. See *Procunier v. Martinez*, 416 U.S. 396 (1974).³

The Court repeatedly has expressed concerns regarding federal-state relationships in cases addressing appropriate remedies for constitutional violations by public authorities. For example, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court admonished that "the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute." *Id.* at 562 (holding that double-celling of pretrial detainees does not violate detainees' due process rights under the Fourteenth Amendment).⁴

Just this Term the Court reaffirmed that concerns of federalism apply to the modification of a judicial decree involving public institutional reform. In *Board of Education of Oklahoma City Public Schools v. Dowell*, 111

³ [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of this fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. at 404-05 (footnote omitted).

While the holding in *Procunier* was partially overruled in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the principles expressed in the language quoted above were reaffirmed in that case. See *id.* at 407-08.

⁴ See also *Rhodes v. Chapman*, 452 U.S. 337, 349-50 (1981) ("There being no constitutional violation, the District Court had no authority to consider whether double celling . . . was the best response to the increase in Ohio's statewide prison population."); *Milliken v. Bradley*, 433 U.S. at 282 (1977) ("Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.").

S.Ct. 630 (1991), the Court relied upon *Milliken v. Bradley* and other cases dealing with judicial authority to impose remedies for constitutional violations, to hold that a request for the modification or dissolution of a school desegregation decree must be judged under standards that give due weight to local control over public institutions. Holding that the *Swift* “grievous wrong” standard was inappropriately applied by the court of appeals to a request to dissolve the decree, the Court stated that “[c]onsiderations based on the allocation of powers within our federal system, we think, support our view that the quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases.” 111 S.Ct. at 637.⁵

Dowell did not involve a request for the modification of an ongoing consent decree because of changed circumstances. *But see Dowell*, 111 S.Ct. at 639 n.1 (Marshall, J., dissenting). The concern for federal-state relationships expressed in *Dowell* is, however, fully applicable to a request by state or local officials for such a modification. An order of a federal court entered on consent of the parties is no less an exercise of federal judicial power than any other judicial act. *See, e.g., Local 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986); *United States v. Swift & Co.*, 286 U.S. at 114; 1B J. Moore, J. Lucas & T. Currier, *Moore’s Federal Practice* ¶ 0.409[5] (1991) (“the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication”). Whether the result of litigation or consent, a decree entered by a federal court in public institutional reform litigation requires the court to engage in continuing supervision

⁵ The Court also emphasized that the standard articulated in *Swift* cannot be fully understood in isolation from the facts of that case. *See Dowell*, 111 S.Ct. at 636. *See also United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); *New York State Association for Retarded Children v. Carey*, 706 F.2d 956, 968 (2d Cir.) (Friendly, J.), *cert. denied*, 464 U.S. 915 (1983).

over the operation of public institutions. The exercise of the court's equitable authority throughout the life of the consent decree is no different than in a case involving a litigated decree. The concerns expressed in *Dowell*, and in the cases relied upon in *Dowell*, thus apply to the modification of a consent decree.

Amici submit that the reasons for rejecting the *Swift* standard in consent decree cases are at least as compelling as those for rejecting that standard in cases, like *Dowell*, involving litigated decrees. In *City of Cleveland*, a case involving a municipal defendant, the Court approvingly quoted our *amicus curiae* brief for the proposition that consent decrees serve important functions and that there are "several . . . advantages" of consent decrees "as a means for settling litigation." See 478 U.S. at 523 n.13 (quoting Brief of *Amici Curiae* National League of Cities, *et al.*). The utilization of consent decrees by public officials will be deterred if a double standard is created, *i.e.*, if litigated decrees are, as the Court held in *Dowell*, not subject to the "grievous wrong" standard of *Swift*, while consent decrees remain subject to that strict standard. See *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979) (analyzing requests for modification under a strict standard will "tend to discourage the settlement of injunction actions by consent decree"), *cert. denied*, 444 U.S. 1026 (1980).

Moreover, the Court has suggested that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *City of Cleveland*, 478 U.S. at 525. It is apparent that even greater sensitivity to the state and local role in operating public institutions is required if consent decree obligations undertaken by the parties may enlarge the scope of federal oversight of public institutions beyond constitutional or statutory requirements.

The factors that distinguish public institutional reform litigation from a traditional injunctive action against private entities also bear emphasis. First, the defendants in an institutional reform case typically are the state or local officials responsible for administering the institution. A settlement arising out of such litigation often will reflect policy decisions about the operation of the public institution that are based on circumstances and predictions subject to change. See *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120. The *Swift* standard, formulated in a case brought to enjoin in perpetuity recurrent, massive violations of the antitrust laws, does not provide the flexibility to deal with such changes.

Second, decrees in public institutional reform cases frequently have a "spillover" effect that has a significant impact on public interests beyond those represented by the parties before the court. See *New York State Association for Retarded Children v. Carey*, 706 F.2d at 969-70 (citing Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976)); Note, *The Modification of Consent Decrees in Institutional Reform Litigation*, 99 Harv. L. Rev. at 1036-37. For example, the question whether to modify the consent decree in this case affects not only the interests of the pretrial detainees of the Suffolk County Jail and the state and local corrections officials; it also has a direct impact upon public safety and local law enforcement.

Considerations like these have led a majority of federal appellate courts to adopt a flexible standard for modification of consent decrees that better responds to the broad range of interests invariably involved in public institutional reform litigation. See *New York State Association for Retarded Children v. Carey*, 706 F.2d at 969-71; *Philadelphia Welfare Rights Organization v.*

Shapp, 602 F.2d at 1120-21. See also *Heath v. De Courcy*, 888 F.2d at 1109-10 (collecting cases). In contrast to the court below, these courts of appeals have appropriately considered the complexity of public institutional reform litigation and the “delicate issues of federal-state relationships” implicated in these cases. They also have recognized the inhibitory effect of a rigid standard for modification of consent decrees. The reasoning of these lower court cases persuasively establishes that the *Swift* standard is not appropriate for modification of consent decrees governing the operation of public institutions. The reliance of the court below on the *Swift* standard to assess the petitioners’ request to modify the consent decree was error.

II. A REQUEST FOR MODIFICATION OF A CONSENT DECREE IN PUBLIC INSTITUTIONAL REFORM LITIGATION SHOULD BE EVALUATED UNDER A “LESS BURDENSOME ALTERNATIVE” STANDARD.

Reversal in this case is required because of the erroneous application of the *Swift* standard by the court below. *Amici* submit, however, that the question of the proper standard to be applied to the modification of consent decrees in public institutional reform litigation is a question of great importance, adequately presented by the record in this case, that should be addressed by the Court.

A. An Appropriate Standard Must Allow for Deference to the Judgment of State and Local Officials.

As noted above, the majority of federal appellate courts have rejected the *Swift* standard in favor of more flexible standards for the assessment of requests to modify consent decrees in public institutional reform litigation. While the analysis applied by these courts varies, their decisions emphasize four factors.

First, these courts have examined whether there has been a change in law or circumstances that justifies modification of the decree. *See, e.g., Nelson v. Collins*, 659 F.2d 420, 427-29 (4th Cir. 1981) (en banc) (increase in prison population and clarification of underlying law by the Court in *Bell v. Wolfish* and *Rhodes v. Chapman* justified modification of consent decree to permit double-celling). Second, they have balanced the interests of the parties and the public. *See, e.g., Heath v. De Courcy*, 888 F.2d at 1109 (acknowledging that institutional reform decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions"). Third, courts have considered the good faith of the defendant. *See, e.g., Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d at 1120-21. Finally, they have examined whether the proposed modification would vitiate the purpose of the decree. *See, e.g., id.* at 1120 (modification would "not leave class members open to the evils to which the lawsuit was first addressed").

While all of these factors are relevant to the modification of consent decrees under a "flexible" approach, the lower courts have thus far failed to devise a coherent analytical framework for applying them. Moreover, while a number of the lower courts have acknowledged the issues of federal-state relations raised by institutional reform litigation, *see, e.g., Heath*, 888 F.2d at 1109, the concern for the local administration of public institutions is not consistently reflected in their decisions. Nor do they adequately articulate the degree of deference due to the judgment of the state and local government officials charged with operation of the public institutions.

To state the obvious, judges are not prison administrators, nor are they responsible to the public for imple-

mentation of ongoing community programs. Unless the Court formulates an appropriate standard that can be consistently applied by the lower courts, *amici* fear that a so-called “flexible” standard may degenerate into little more than an exercise in *ad hoc* judicial supervision of public institutions. In such event, the federal court’s relatively unrestrained “equitable” discretion could displace focussed evaluation of detailed alternatives devised by professionals best able to address the complex underlying problems. *Amici* accordingly propose the standard below.

B. A Proposed “Less Burdensome Alternative” Standard.

Amici propose that state or local government officials should be afforded modification of a consent decree governing the administration of a public institution if:

(1) the officials show that, despite good faith efforts to comply with the decree, a change in circumstances has arisen during the administration of the decree that excessively burdens a substantial public interest;

(2) the officials show that the purposes of the decree can be accomplished by less burdensome means; and

(3) the party opposing the proposed modification is unable to show either that the proposed modification would violate its constitutional or statutory rights, or that an alternative modification that serves the purposes of the original decree is preferable to the beneficiaries of the decree and would equally well address the burden on the public interest created by continued adherence to the original decree.

This proposed standard—a “less burdensome alternative” standard, *see Dowell*, 111 S.Ct. at 639 n.1 (Marshall, J., dissenting)—seeks to accommodate state and local interests in an appropriate manner while recognizing the obligatory, partly contractual character of a consent decree. The first element of the proposed standard—lim-

iting modifications to situations in which changed circumstances establish that continued enforcement of the decree imposes an undue burden on a substantial public interest—ensures that modifications will not be granted absent a strong showing. The mere fact that compliance with a decree is more expensive than contemplated, or that state or local revenues are lower than in the past, would not in our view ordinarily constitute the type of burden that would, without more, warrant modification of the decree. Nor would the good faith of a party seeking modification generally be demonstrable where the changes in circumstances offered to justify the modification were clearly foreseeable at the time the decree was negotiated.

We recognize that public officials, no less than private parties, as a general rule must abide by their agreements. Nor can they incessantly dispute the original premises of a decree or its attendant cost, if those premises or that cost were or should have been addressed at the time the decree was negotiated.⁶ Once the threshold for obtaining a modification has been met, however, we submit that the federal courts should show substantial deference to the judgment of state and local officials concerning the means by which the purposes of the decree may be achieved. See *Procunier v. Martinez*, 416 U.S. at 404-405; *Bell v. Wolfish*, 441 U.S. at 562.⁷

⁶ These requirements thus recognize the partly contractual nature of a consent decree. See *City of Cleveland*, 478 U.S. at 519 (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-237 & n.10 (1975)). The plaintiffs are entitled to the benefit of their bargain with the state or local government to the extent that this bargain is not incompatible with legitimate conflicting government interests. Indeed, the "changed circumstances" and "increased burden" elements of the proposed standard are analogous to the contract law principle of "impracticability" pursuant to which the obligor's performance may be discharged by changed circumstances rendering that performance unduly burdensome. See *Restatement (Second) of Contracts* § 261 (1979).

⁷ While the proposed standard requires the state or local officials to show that the "purposes of the decree" can be served through less

We do not propose that the federal courts blindly defer to the judgment of state or local officials in devising less burdensome means for achieving the purposes of a decree. A federal court must ensure that the proposed modification does not violate the constitutional or statutory rights the decree was designed to protect. Moreover, there may be cases in which the beneficiaries of a decree can frame an alternative solution to the problem identified by the government officials that successfully addresses that problem, yet is preferable to the beneficiaries. Indeed, expressly recognizing this possibility may encourage the contending parties to explore alternatives, thereby avoiding the need for judicial arbitration of their differences. The courts may entertain any proposals as long as they serve both the purposes of the decree and the interests of the public. Federal courts must, however, give deference to the considered views of appropriate state or local officials when determining whether the proposed modification addresses the burden created by the decree.

burdensome means, we do not agree with the court below insofar as its opinion suggests that the "purposes" of the decree are to be ascertained solely through the detailed language of the decree itself—*i.e.*, that the decree's purposes are coextensive with the terms "agreed upon" in the decree sought to be modified.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Of Counsel:

ZACHARY D. FASMAN

MARK L. GERCHICK

PAUL, HASTINGS, JANOFSKY

& WALKER

Twelfth Floor

1050 Connecticut Ave., N.W.

Washington, D.C. 20036

(202) 223-9000

RICHARD RUDA

Chief Counsel

STATE AND LOCAL LEGAL

CENTER

444 N. Capitol Street, N.W.

Suite 349

Washington, D.C. 20001

(202) 638-1445

Counsel of Record for

Amici Curiae

April 15, 1991



APR 15 1991

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

RUFO,

Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL,

Respondents.

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,

Petitioner,

v.

INMATES OF SUFFOLK COUNTY JAIL,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

BRIEF AMICI CURIAE FOR THE
STATE OF TENNESSEE, ET AL.,
IN SUPPORT OF PETITIONERS

Of Counsel:

JOEL I. KLEIN
PAUL M. SMITH
RICHARD G. TARANTO
ONEK, KLEIN & FARR
2550 M Street, N.W.
Suite 350
Washington, D.C. 20037
(202) 775-0184

CHARLES W. BURSON*
Attorney General and
Reporter State of Tennessee
MICHAEL W. CATALANO
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-3499

*Counsel of Record

(Additional Counsel listed on inside cover)

HONORABLE CHARLES COLE
Attorney General of Alaska
Office of the Attorney General
State Capitol
P.O. Box K
Juneau, AK 99811-0300

HONORABLE GRANT WOODS
Attorney General of Arizona
Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007

HONORABLE WINSTON BRYANT
Office of the Attorney General
200 Tower Building
323 Center Street
Little Rock, AR 72201

HONORABLE DAN LUNGREN
Attorney General of
California
Office of the Attorney General
1515 K Street
Sacramento, CA 94244-2550

HONORABLE GALE NORTON
Attorney General of Colorado
Office of the Attorney General
Department of Law
110 Sixteenth Street
10th Floor
Denver, CO 80202

HONORABLE
CHARLES M. OBERLY III
Attorney General of Delaware
Office of the Attorney General
8th Floor
820 North French Street
Wilmington, DE 19801

HONORABLE
ROBERT A. BUTTERWORTH
Attorney General of Florida
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050

HONORABLE MICHAEL J. BOWERS
Attorney General of Georgia
Office of the Attorney General
Department of Law
132 State Judicial Building
Atlanta, GA 30334

HONORABLE
ELIZABETH BARRETT-ANDERSON
Attorney General of Guam
Office of the Attorney General
Department of Law
Suite 701
238 Archbishop F.C.
Flores Street
Agana, GU 96910

HONORABLE WARREN PRICE III
Attorney General of Hawaii
Office of the Attorney General
425 Queen Street
Honolulu, HI 96813

HONORABLE LARRY ECHOHAWK
Attorney General of Idaho
Office of the Attorney General
Insurance Department
State House
Boise, ID 83720

HONORABLE ROLAND W. BURRIS
Attorney General of Illinois
Office of the Attorney General
State of Illinois Center
12th Floor
100 West Randolph Street
Chicago, IL 60601

HONORABLE LINLEY E. PEARSON
Attorney General of Indiana
Office of the Attorney General
219 State House
Indianapolis, IN 46204

HONORABLE BONNIE CAMPBELL
Attorney General of Iowa
Office of the Attorney General
Hoover State Office Building
Second Floor
Des Moines, IA 50319

HONORABLE ROBERT T. STEPHAN
Attorney General of Kansas
Office of the Attorney General
Judicial Center
Second Floor
Topeka, KS 66612

HONORABLE FRED COWAN
Attorney General of Kentucky
Office of the Attorney General
State Capitol
Frankfort, KY 40601

HONORABLE
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
Office of the Attorney General
Department of Justice
2-3-4 Loyola Building
New Orleans, LA 70112-2096

HONORABLE
MICHAEL E. CARPENTER
Attorney General of Maine
Office of the Attorney General
State House
Augusta, ME 04330

HONORABLE
J. JOSEPH CURRAN, JR.
Attorney General of Maryland
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202

HONORABLE FRANK J. KELLEY
Attorney General of Michigan
Office of the Attorney General
Law Building
525 West Ottawa
P.O. Box 30212
Lansing, MI 48909

HONORABLE
HUBERT H. HUMPHREY III
Attorney General of
Minnesota
Office of the Attorney General
102 State Capitol
St. Paul, MN 55155

HONORABLE MIKE MOORE
Attorney General of
Mississippi
Office of the Attorney General
Department of Justice
Carroll Gartin Justice
Building
P.O. Box 220
Jackson, MS 39205

HONORABLE WILLIAM L. WEBSTER
Attorney General of Missouri
Office of the Attorney General
Supreme Court Building
101 High Street, P.O. Box 899
Jefferson City, MO 65102

HONORABLE

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Office of the Attorney General
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

HONORABLE JOHN P. ARNOLD
Attorney General of
New Hampshire
Office of the Attorney General
State House Annex
25 Capitol Street
Concord, NH 03301-6397

HONORABLE ROBERT J. DEL TUFO
Attorney General of
New Jersey
Office of the Attorney General
Division of Law
Richard J. Hughes
Justice Complex
25 Market Street
Trenton, NJ 08625

HONORABLE TOM UDALL
Attorney General of
New Mexico
Office of the Attorney General
Bataan Memorial Building
Galisteo Street, P.O. Box 1508
Santa Fe, NM 87504-1508

HONORABLE

LACY H. THORNBURG
Attorney General of
North Carolina
Office of the Attorney General
Department of Justice
2 East Morgan Street
P.O. Box 629
Raleigh, NC 27602

HONORABLE NICHOLAS SPAETH
Attorney General of
North Dakota
Office of the Attorney General
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

HONORABLE LEE FISHER
Attorney General of Ohio
Office of the Attorney General
State Office Tower
30 East Broad Street
Columbus, Ohio 43266

HONORABLE ROBERT H. HENRY
Attorney General of
Oklahoma
Office of the Attorney General
State Capitol
Oklahoma City, OK 73105

HONORABLE DAVE FROHNMAYER
Attorney General of Oregon
Office of the Attorney General
100 Justice Building
Salem, OR 97310

HONORABLE

EARNEST D. PREATE, JR.
Attorney General of
Pennsylvania
Office of the Attorney General
Strawberry Square
Harrisburg, PA 17120

HONORABLE

HECTOR RIVERA-CRUZ
Attorney General of
Puerto Rico
Office of the Attorney General
Department of Justice
P.O. Box 192
San Juan, PR 00902

HONORABLE JAMES E. O'NEIL
Attorney General of
Rhode Island
Office of the Attorney General
72 Pine Street
Providence, RI 02903

HONORABLE T. TRAVIS MEDLOCK
Attorney General of
South Carolina
Office of the Attorney General
Rembert Dennis Office
Building
1000 Assembly Street
Columbia, SC 29211

HONORABLE

MARK "BARNEY" BARNETT
Attorney General of
South Dakota
Office of the Attorney General
500 E. Capitol
Pierre, SD 57501-5070

HONORABLE PAUL VAN DAM
Attorney General of Utah
Office of the Attorney General
State Capitol
Salt Lake City, UT 84114

HONORABLE JEFFREY L. AMESTOY
Attorney General of Vermont
Office of the Attorney General
Pavilion Office Building
Montpelier, VT 05602

HONORABLE ROSALIE BALLENTINE
Acting Attorney General
of the Virgin Islands
Office of the Attorney General
Department of Justice
G.E.R.S. Complex
2nd Floor
No. 48B-50C
Kronprindsens Gade
St. Thomas, VI 00802

HONORABLE MARY SUE TERRY
Attorney General of Virginia
Office of the Attorney General
5th Floor
101 North 8th Street
Richmond, VA 23219

HONORABLE KEN EIKENBERRY
Attorney General of
Washington
Office of the Attorney General
Highways-Licenses Building
PB71
Olympia, WA 98504

HONORABLE MARIO PALUMBO
Attorney General of
West Virginia
Office of the Attorney General
State Capitol
Charleston, WV 25305

HONORABLE JOSEPH B. MEYER
Attorney General of Wyoming
Office of the Attorney General
123 State Capitol
Cheyenne, WY 82002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. FEDERAL COURT DECREES GOVERNING STATE PROGRAMS SHOULD BE MODIFIED WHENEVER NECESSARY TO ENSURE THAT THEY ARE NARROWLY TAILORED TO REM- EDY FEDERAL LAW VIOLATIONS.....	4
A. Motions to Modify Federal Decrees Are Subject To Traditional Equitable Considerations	5
B. The Interests In Ensuring That A Federal Remedial Decree Affecting State Programs Is Properly Tailored Are Substantial And Ongoing	7
C. The Legitimate Finality Interests Implicated By Institutional Decrees Are Slight And Can Readily Be Accommodated Within The Struc- ture Of A Flexible Approach To Modification	19
II. A FEDERAL COURT CONSENT DECREE DIRECTED AT STATE PROGRAMS SHOULD BE SUBJECT TO THE SAME FLEXIBLE MODIFICA- TION STANDARD AS A CONTESTED REMEDY	22
A. A Flexible Approach To Modification Will Not Decrease The Likelihood Of Settlement	23
B. A Contractual Theory Does Not Justify Per- petrating A Decree Governing State Opera- tions	24
CONCLUSION	30

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Angel v. Bullington</i> , 330 U.S. 183 (1947).....	21
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	3, 7, 16
<i>Board of Education of Oklahoma City v. Dowell</i> , 111 S.Ct. 630 (1991).....	3, 5, 6
<i>Brewster v. Dukakis</i> , 687 F.2d 495 (1st Cir. 1982).....	11
<i>Chicago & Alton R.R. v. Tranberger</i> , 238 U.S. 67 (1915)	26
<i>Costello v. Wainwright</i> , 397 F. Supp. 20 (M.D. Fla. 1975).....	12
<i>Dunn v. Carey</i> , 808 F.2d 555 (7th Cir. 1986).....	14
<i>Duran v. Carruthers</i> , 885 F.2d 1485 (10th Cir. 1989), cert. denied, 110 S.Ct. 865 (1990).....	22, 28
<i>El Paso v. Simmons</i> , 379 U.S. 497 (1965).....	26
<i>Ex Parte Young</i> , 209 U.S. 123 (1908)	4, 27
<i>Fair Assessment in Real Estate Association, Inc. v.</i> <i>McNary</i> , 454 U.S. 100 (1981)	8
<i>Fambro v. Fulton County</i> , 713 F. Supp. 1426 (N.D. Ga. 1989).....	17
<i>Federated Dep't Stores, Inc. v. Moitie</i> , 452 U.S. 394 (1981)	20
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 558 (1985).....	29, 30
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976).....	30
<i>Great Lakes Dredge & Dock Co. v. Huffman</i> , 319 U.S. 293 (1943)	8

TABLE OF AUTHORITIES - Continued

	Page(s)
<i>Halderman v. Pennhurst State School and Hospital</i> , 610 F. Supp. 1221 (E.D. Pa. 1985)	20
<i>Home Building & Loan Ass'n v. Blaisdell</i> , 290 U.S. 398 (1934)	26
<i>Homeward Bound, Inc. v. Hissom Memorial Center</i> , No. 85-C-437-E (N.D. Okla., July 27, 1987)	17
<i>Inmates of Allegheny County Jail v. Wecht</i> , 573 F. Supp. 454 (W.D. Pa. 1983)	17
<i>Kasper v. Board of Education Comm'rs</i> , 814 F.2d 322 (7th Cir. 1987)	15, 25
<i>King-Seeley Thermos Co. v. Aladin Industries, Inc.</i> , 418 F.2d 31 (2d Cir. 1969)	6
<i>Kozlowski v. Coughlin</i> , 871 F.2d 241 (2d Cir. 1987)	28
<i>Lawrence Manufacturing Co. v. Jonesville Cotton Mills</i> , 138 U.S. 552 (1891)	21
<i>Lelsz v. Kavangh</i> , 807 F.2d 1243 (5th Cir.) <i>reh'g and reh'g en banc denied</i> , 815 F.2d 1034, <i>cert. dis- missed</i> , 108 S.Ct. 44 (1987)	17, 28
<i>Local No. 93, Firefighters v. City of Cleveland</i> , 478 U.S. 501 (1986)	25, 28, 29, 30
<i>Mayberry v. Maroney</i> , 558 F.2d 1159 (3d Cir. 1977)	5
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1976)	8, 15
<i>New York State Assoc. for Retarded Children, Inc. v. Carey</i> , 393 F. Supp. 715 (E.D.N.Y. 1975)	11
<i>New York State Ass'n for Retarded Children, Inc. v. Carey</i> , 706 F.2d 956 (2d Cir.) <i>cert. denied</i> , 464 U.S. 915 (1983)	26

TABLE OF AUTHORITIES – Continued

Page(s)

<i>Pasadena City Board of Education v. Spangler</i> , 427 U.S. 424 (1976)	4, 6, 7, 9
<i>Pennhurst State School and Hospital v. Halderman</i> , 465 U.S. 89 (1984)	4, 14, 27
<i>Pennsylvania Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3rd Cir. 1979)	13, 24
<i>Philadelphia Police & Fire Ass'n v. City of Philadelphia</i> , 705 F. Supp. 1103 (E.D. Pa.), <i>rev'd</i> , 874 F.2d 156 (3d Cir. 1989)	17
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1975)	9, 16
<i>Pugh v. Rainwater</i> , 557 F.2d 1189 (1977)	14
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979)	30
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	7, 8, 15
<i>Rizzo v. Goode</i> , 423 U.S. 362 (1976)	2, 7, 8
<i>Ruiz v. Estelle</i> , 679 F.2d 1115, 1140 n.98, 1153 (5th Cir. 1982), <i>cert. denied</i> , 464 U.S. 915 (1983)	22
<i>Sansom Comm. v. Lynn</i> , 735 F.2d 1535 (3d Cir. 1984)	25
<i>Stone v. Mississippi</i> , 101 U.S. 814 (1879)	26
<i>System Federation No. 91, Ry. Employers' Dep't v. Wright</i> , 364 U.S. 642 (1961)	3, 5, 23, 25, 30
<i>Swann v. Charlotte-Mecklenburg Board of Education</i> , 402 U.S. 1 (1971)	7
<i>Toussaint v. McCarthy</i> , 801 F.2d 1080 (9th Cir. 1986), <i>cert. denied</i> , 481 U.S. 1069 (1987)	12, 17, 19
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	9
<i>United States v. City of Miami</i> , 614 F.2d 1322 (5th Cir. 1980) <i>rev'd on other grounds</i> , 664 F.2d 435 (5th Cir. 1981) (<i>en banc</i>)	24

TABLE OF AUTHORITIES – Continued

	Page(s)
<i>United States v. Michigan</i> , 680 F. Supp. 928 (W.D. Mich. 1987).....	20
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932)	5, 6, 18, 19, 20, 23
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977)	26
<i>Washington v. Penwell</i> , 700 F.2d 570 (9th Cir. 1983) .	27, 28
<i>Wyatt v. Stickney</i> , 344 F. Supp. 373 (M.D. Ala. 1972) .	11, 12
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1983)	16
<i>Younger v. Harris</i> , 401 U.S. 37 (1971).....	8
 OTHER	
Anderson, <i>The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation</i> , 1983 U. Ill. L. Rev. 579	23
P. Cooper, <i>Hard Judicial Choices: Federal District Court Judges and State and Local Officials</i> , (Oxford Univ. Press, Inc. 1988)	21
Diver, <i>The Judge As Political Powerbroker: Superintending Structural Change In Public Institutions</i> , 65 Va. L. Rev. 43 (1979)	13
Easterbrook, <i>Justice and Contract in Consent Judgments</i> , 1987 Univ. Chi. Law Forum 19.....	27
Fiss, <i>The Forms of Justice</i> , 93 Harv. L. Rev. 1, 27 (1979)	12, 18
O. Fiss, <i>The Civil Rights Injunction</i> , (1978)	12
Frug, <i>The Judicial Power of the Purse</i> , 126 U. Pa. L. Rev. 715 (1978)	14

TABLE OF AUTHORITIES – Continued

	Page(s)
Gettinger, "Cruel and Unusual" Prisons, 3 Corrections Magazine 3.5 (Dec. 1977).....	15
Horowitz, <i>Decreeing Organizational Change: Judicial Supervision of Public Institutions</i> , 1983 Duke L. J. 1265, 1294.....	14, 15
McConnell, <i>Why Hold Elections? Using Consent Decrees To Insulate Policies From Political Change</i> , 1987 Univ. Chi. Legal Forum 295	22, 26
Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (Mar. 13, 1986) reprinted in relevant part at 54 U.S.L.W. 2492 (Apr. 1, 1986)	24
<i>The National Prison Project, Status Report: The Courts and Prisons</i> (Jan. 1, 1990).....	10
Note, <i>Federalism and Federal Consent Decrees Against State Governmental Entities</i> , 88 Colum. L. Rev. 1796 (1988).....	27
Note, <i>Implementation Problems in Institutional Reform Litigation</i> , 91 Harv. L. Rev. 428 (1977).....	13
Note, <i>The Modification of Consent Decrees In Institutional Reform Litigation</i> , 99 Harv. L. Rev. 1020 (1986)	18
B. Porter, <i>Order by the Court: Special Masters In Corrections</i> 4 (1988)	16
Resnik, <i>Judging Consent</i> , 1987 Univ. Chi. Law Forum 43	23
Rhode, <i>Class Conflict in Class Actions</i> , 34 Stan. L. Rev. 1183 (1982).....	20

TABLE OF AUTHORITIES - Continued

	Page(s)
Special Report, <i>The Remedial Process in Institutional Reform Litigation</i> , 78 Colum. L. Rev. 784 (1978)	13
L. Thornburg, Atty. Gen. of North Carolina, <i>National Prison Conditions Litigation Survey</i> (1991)	11, 14, 16
U.S. Department of Justice, <i>Prison Crowding and Court-Ordered Population Caps: Report to the President</i> 1990	13, 16

In The
Supreme Court of the United States

October Term, 1990

No. 90-954

RUFO,

v.

Petitioner,

INMATES OF THE SUFFOLK COUNTY JAIL,

Respondents.

No. 90-1004

GEORGE C. VOSE,
COMMISSIONER OF CORRECTION,

v.

Petitioner,

INMATES OF SUFFOLK COUNTY JAIL,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit

BRIEF AMICI CURIAE FOR THE STATES OF TENNESSEE,
ALASKA, ARKANSAS, ARIZONA, CALIFORNIA, COLO-
RADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO,
ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISI-
ANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MIS-
SISSIPPI, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW
JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH
DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,
UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIR-
GINIA, WYOMING, THE COMMONWEALTH OF PUERTO
RICO, AND THE TERRITORIES OF GUAM AND THE VIRGIN
ISLANDS IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

This case presents the question whether a district court may refuse to delete provisions from a consent decree that require a State to satisfy obligations not imposed by federal law. That issue is of major importance to the 45 States/Territories that here file as amici, because virtually every State currently operates under one or more comprehensive remedial decrees affecting their prisons, mental hospitals and/or mental retardation centers. Many of those decrees have been in existence for more than a decade and have imposed heavy financial costs on the States while also leading to increasing federal court intrusions into program operations.

To the extent those costs and intrusions are necessary to remedy federal law violations, amici recognize that the States are required to bear them under our constitutional system. That same system, however, also demands that federal court intervention into state operations go no further than required to ensure compliance with federal law. *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 377-78 (1976). In amici's view, the second half of this constitutional balance is too often disregarded in cases involving state institutions, as federal courts expansively enforce remedial decrees that are not properly tailored to legitimate federal law concerns.

In this case, for example, the district court, affirmed *per curiam* by the First Circuit, refused to delete a single-celling requirement for pre-trial detainees, not because it was constitutionally appropriate, but rather because it "was an important element of the relief sought in this litigation," Pet. App. 12a, and defendants had agreed to it more than a decade ago. The fact that, subsequent to the entry of the decree, this Court handed down a decision

directly on point, holding that pre-trial detainees have no federal right to a single cell, *see Bell v. Wolfish*, 441 U.S. 520, 541 (1979), was considered irrelevant by the district court.

That kind of inflexible approach to modification is required neither by this Court's precedents, as the district court supposed, nor by a sensible application of traditional equitable principles. *See System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961). On the contrary, especially when state programs are affected, federal court remedial decrees should be modified as necessary to ensure that they are not overbroad. *See Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630 (1991); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). The fundamental principles of federalism and separation of powers that generally require federal courts to tailor remedies to violations also apply at the time of modification; and the countervailing interests in finality do not support a different conclusion.

Even when a decree is initially entered by consent, it still must be carefully tailored once consent is prospectively withdrawn through a modification motion. There is no place for rigid federal court enforcement of a contract indefinitely restricting the exercise of sovereign powers that would not otherwise be constrained by the supremacy of federal law. Such an approach is thus entirely inconsistent with basic federalism and Eleventh Amendment requirements. Indeed, the state officials whose consent is being invoked to bind the state were amenable to suit in federal court only because of the narrow, judge-made exception to the Eleventh Amendment deemed necessary to ensure that States would comply with federal law. *See Ex Parte Young*, 209 U.S. 123, 156-57 (1908). That exception cannot support the entirely different conclusion

that state officials are free to bind a State to *extra-federal* law requirements. See *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984).

For those reasons, amici urge this Court to establish a flexible approach to modification motions aimed at ensuring that federal remedial decrees governing state programs continue to be properly tailored. Those decrees have a massive impact on state policies and cause substantial conflicts between the federal courts and democratically elected state officials. It is only proper that such costs not be borne by the States unless they are necessary to satisfy federal law.

ARGUMENT

A federal court consent decree binding state officials should be modified as necessary to ensure that it is no more intrusive than required to protect federal rights. The interests in having a properly tailored decree outweigh the limited finality interests in perpetuating a decree that is excessive. The consensual nature of a remedy, moreover, neither reduces the importance of tailoring the decree nor otherwise increases the justification for a more demanding modification standard.

I. FEDERAL COURT DECREES GOVERNING STATE PROGRAMS SHOULD BE MODIFIED WHENEVER NECESSARY TO ENSURE THAT THEY ARE NARROWLY TAILORED TO REMEDY FEDERAL LAW VIOLATIONS.

Contrary to the view of the courts below, this Court has not established a general rule prohibiting modification of remedial decrees absent extreme circumstances. Instead, the Court has consistently taken a pragmatic,

equitable approach to modification, weighing the competing interests in ensuring that a prospective decree is legally correct against the potential unfairness and inefficiency of relitigating matters that have once been resolved. In the specific context of a federal decree governing state programs, that balance supports a highly flexible approach to modification focusing on whether the decree goes beyond what is required to vindicate federal rights.

A. Motions to Modify Federal Decrees Are Subject To Traditional Equitable Considerations.

The district court in this case started from the premise that this Court has established an inflexible modification standard applicable to all federal equitable decrees: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." Pet. App. 8a, quoting *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). Although that rigid view has on occasion been followed by other courts, *see, e.g., Mayberry v. Maroney*, 558 F.2d 1159, 1163-64 (3d Cir. 1977), it is plainly wrong. This Court has made clear that the quoted language from *Swift* must be read in "context," *Dowell*, 111 S. Ct. at 636, and that a modification decision, like any other equitable ruling, should take into account all of the relevant equitable interests. *See System Federation No. 91*, 364 U.S. at 647-48. In particular, "[a] balance must be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances." 364 U.S. at 647-48.

The Court's decision in *System Federation* – a case involving only private parties – illustrates the balancing

required in modification cases. The Court held that a consent decree should be modified simply because Congress had changed the statute on which the decree was initially based; no inquiry was made into whether the change in law could have been "foreseen" or whether the decree was causing "grievous wrong" (other than that it had become legally incorrect). *See also King-Seeley Thermos Co. v. Aladin Industries, Inc.*, 418 F.2d 31, 35 (2d Cir. 1969) (Friendly, J.) ("While changes in fact or law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purpose.").

A flexible approach is even more clearly mandated in cases involving supervision of *public* entities. Thus, the Court recently held that a desegregation decree should be terminated altogether once a court finds that constitutional requirements are being met and that defendants are unlikely to "return to their former ways." *Dowell*, 111 S. Ct. at 637. In so ruling, it was expressly held that the "language from *Swift* [quoted above] does not provide the proper standard to apply to injunctions entered in school desegregation cases." *Ibid.* Similarly, even before *Dowell*, the Court had ruled that a post-judgment decision that merely elaborates or clarifies the law provides strong support for eliminating a central provision of a desegregation decree. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437-38 (1976).¹ The district court in this

¹ The decree in *Spangler* was ambiguous with respect to the disputed provision and the parties had interpreted it differently from the district court. The Court held that this consideration further supported modification. 427 U.S. at 438.

case was thus incorrect in concluding that a modification motion premised on an intervening ruling of this Court should be denied unless the decision "directly overrule[s] the legal interpretation on which the . . . consent decree was based." Pet. App. 10a.²

B. The Interests In Ensuring That A Federal Remedial Decree Affecting State Programs Is Properly Tailored Are Substantial And Ongoing.

It is by now axiomatic that federal decrees governing state operations must be narrowly tailored so that they do not intrude needlessly into the exercise of traditional state prerogatives by properly designated state executive and legislative officials. Those state interests do not forever vanish once a decree is entered. On the contrary, the essential constitutional line between remedying violations and broadly regulating state programs tends to become increasingly blurred during the process of implementing a decree.

1. This Court has repeatedly emphasized that "federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own laws." *Rizzo v. Goode*, 423 U.S. at 378 (internal quotes

² Indeed, in *Spangler*, itself, the decision that supported modification, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), did not overrule a prior decision that had been relied on by the district court. On the contrary, this Court indicated that *Swann* was not completely inconsistent with the district court's approach in *Spangler*. See, 427 U.S. at 434. Viewed in that light, the court below clearly erred in not modifying the decree in this case on the basis of the subsequent decisions in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

omitted). See also *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943) ("It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states"). In particular, given the fundamental federalism and separation-of-powers concerns implicated by equitable decrees, the federal courts have an obligation "to tailor the scope of [a] remedy to fit the nature and extent of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280 (1976). See also *Rhodes v. Chapman*, 452 U.S. at 351 ("courts must bear in mind that their inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a [state institution]") (internal quotes omitted).

The federalism dimension of the tailoring principle rests on "a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971); see *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 111 (1981); *Rizzo v. Goode*, 423 U.S. at 379. That recognition is disserved by an overbroad remedial decree because it effects a needless and unjustified transfer of authority from the States to the federal courts. For example, a preference for single, rather than double, celling implicates not only policy choices about prison administration and security, but also economic decisions about how to allocate a State's resources. Thus, although a single-celling requirement might be promoted as nothing more than a decent benefit for prisoners, the fact is that

the money needed to satisfy such a requirement comes from other state programs, which would normally be able to compete for resources in the legislature but cannot do so in federal court.

In addition to respecting federalism concerns, a careful tailoring approach also rests on a separation-of-powers principles. As this Court observed in *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1975):

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to solution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of the fact reflects no more than a healthy sense of realism.

Id. at 404-05, *See also Turner v. Safley*, 482 U.S. 78, 85 (1987).

Federal courts are not free to disregard these paramount federalism and separation-of-powers concerns simply because a remedy has been entered. Every day that an institutional decree exists, it has a major effect on important policy and budgetary issues. To the extent that such substantial displacements of state prerogatives are not necessary to cure federal law violations, therefore, they should readily be eliminated when a State seeks modification. That conclusion, as the Court explained in *Dowell*, is derived from "[c]onsiderations based on the allocation of powers within our federal system." 111 S. Ct. at 637. *See also Spangler*, 427 U.S. at 435 (district court "exceeded its authority" in enforcing an overbroad decree).

2. Two decades of experience with decrees governing state institutional programs also supports a flexible approach to modification. That experience teaches that an initial decree, far from ending the lawsuit, simply marks out a few of the boundaries within which further highly contentious and protracted litigation is then conducted. During the life of such a decree, many things directly affecting its implementation are sure to change. In addition, the federal courts, eager for good results and often frustrated by the intractable nature of institutional problems, tend to become increasingly involved in administered programs, typically through the use of judicial adjuncts such as masters or monitors, thereby heightening traditional federalism and separation-of-powers concerns.

a. The pervasiveness of broad federal court decrees that regulate the operations of state institutions is remarkable. More than 40 states were subject to a major prison decree during the decade of the 1980s, nine of which had their entire correctional system under decree. See *The National Prison Project, Status Report: The Courts and Prisons* (Jan. 1, 1990) (herein *Prison Project*).³ About 60 percent of these decrees were entered by consent. *Ibid.* Although comparable numbers apparently have not been collected in mental health and mental retardation cases, there is no question that many States (probably well above half) operate under comprehensive remedial decrees in this area as well.

These remedial decrees, while not identical, nevertheless tend to resemble each other in significant

³ Copies of that report, summarizing the status of prison conditions litigation in each of the States, have been lodged with the Clerk of this Court in this case.

respects. In general, they contain dozens of pages (if not more) of detailed regulations comprehensively affecting institutional operations and physical plant. For example, approximately 80 percent of the prison decrees have population restrictions, usually through minimum square footage requirements, with about one-third containing single-celling provisions; more than 70 percent have requirements concerning educational and vocational opportunities for inmates; more than half have staffing requirements; a similar number have requirements concerning classification procedures (maximum, medium, or minimum security) and inmate discipline; and just under half contain visitation policies. See L. Thornburg, Attorney General of North Carolina, *National Prison Conditions Litigation Survey*, pp. 6-9 (1991) (hereinafter *National Prison Conditions Litigation Survey*).⁴ Mental health or retardation decrees frequently require placement in the "least restrictive environment" – which has often been treated as meaning outside the institution and in "integrated community residences" – plus treatment designed to "maximize the individual's ability" and a host of other improvements in staffing, services, and living conditions. See, e.g., *Brewster v. Dukakis*, 687 F.2d 495 (1st Cir. 1982); *New York State Assoc. for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972).

These decrees are commonly referred to as "structural injunctions," because their avowed purpose is to

⁴ Copies of this survey, which is based on responses by thirty-two States, have been lodged with the clerk of this Court in this case.

"effectuate the reorganization of an ongoing social institution." *Toussaint v. McCarthy*, 801 F.2d 1080, 1088 n.2 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), *quoting* O. Fiss, *The Civil Rights Injunction*, (1978). Given that goal, it is hardly surprising that such decrees rarely have an end point. Indeed, some have already been in effect for close to two decades. *See, e.g., Wyatt v. Stickney, supra* (mental health); *Costello v. Wainwright*, 397 F. Supp. 20 (M.D. Fla. 1975) (prisons). As Professor Fiss has aptly remarked: "The remedial phase in structural litigation . . . has a beginning, maybe a middle, but no end – well, almost no end. It involves a long and continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but with the giving or the shaping of the remedy itself." Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 27 (1979).

During this lengthy remedial process, many of the factors necessarily affecting it remain in continual flux. Until a decree is implemented, it is often difficult to anticipate how particular provisions – requiring movement from an institution to a community placement, for example – will actually work out or how much they will actually cost. In addition, such decrees are certain to outlast entire state administrations, let alone particular defendant officials. As a result, there will be personnel adjustments, policy adjustments, and budgetary adjustments that inevitably have a bearing on the remedial process. These variables are made yet more uncertain by the fact that the number of prisoners or patients covered by the decree will change over time. And the substantive law in the area of institutional rights is also constantly evolving and being clarified. Collectively, these considerations guarantee that the process of implementing a decree will be much more complex than the process of

designing one. See, e.g., *Pennsylvania Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3rd Cir. 1979) (noting vast practical differences between "relatively simple prohibitory injunctions" in cases like *Swift* and a "complex ongoing remedial decree" in public law cases). See generally, Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977); Special Report, *The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784 (1978).

b. This kind of process, whatever its legitimacy, is bound to cause friction between federal courts and the state governments they partly control. On the state side, the process has significant political and governmental implications, yet it is sheltered from the normal political processes in which competing policy positions as well as claims on resources are democratically resolved. On the judicial side, the length and complexity of the process frequently cause growing frustration with the State's response, thus leading to further judicial control and management. See Generally Diver, *The Judge As Political Powerbroker: Superintending Structural Change In Public Institutions*, 65 Va. L. Rev. 43 (1979).

The political dimensions of the process are pervasive. At its most obvious, an overbroad decree can have negative, even if unanticipated, consequences that are of major public concern. For example, according to the Attorney General of the United States, "[j]udicial involvement, by court order or consent decree, in establishing caps on inmate populations, has seriously curtailed the ability of state and local officials to manage prisons, jails and entire corrections systems effectively. It has also adversely affected public safety." U.S. Department of Justice, *Prison Crowding and Court-Ordered Population Caps:*

Report to the President 1990, at 1 (hereinafter *Prison Crowding*). More subtly, such decrees are sometimes used by government officials as "a ploy in some other struggle"; thus, officials who "have been frustrated by their inability to win political approval" for a program may find that a judicial decree provides political shelter by permitting those officials to claim that an unpopular program was required by the federal court. *Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986). See Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L. J. 1265, 1294 ("There is commonly also a desire on the part of some officials to use a decree entered against them as a weapon in the political struggle to vindicate their view of the appropriate treatment, rehabilitation or other policy goal for the institution.").

In addition, broad structural decrees generate major financial problems. The costs of implementation, which are almost impossible to predict with any accuracy at the time a decree is entered, often turn out to be large and open-ended. For example, several States report that the costs of complying with prison decrees has been in the range of "hundreds of millions of dollars." *National Prison Conditions Litigation Survey* at 10-11. See also *Pennhurst State School and Hospital v. Halderman*, 451 U.S. at 24 (referring to the "enormous financial burden of providing 'appropriate' treatment in the 'least restrictive setting' "). As the Fifth Circuit has wisely observed, "it is simpler to order prison reform than to pay for it." *Pugh v. Rainwater*, 557 F.2d 1189, 1192 n.9 (1977). Not surprisingly, therefore, state legislatures and governors, faced with major portions of their budgets that are both off-limits and largely uncontrollable, become concerned. See generally Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715 (1978).

These concerns are frequently fueled by the fact that the state officials, who operate the prison or mental health system, frequently use decrees aggressively in the budgeting process. In particular, such officials essentially argue that, if their department does not get what it seeks, they will be compelled to tell the court that they cannot meet the decree's requirements, thus raising the spectre of contempt motions and yet more judicial control. As one Commissioner of Corrections candidly acknowledged, "I think the federal courts are going to have to force cities and states to spend more money on their prisons. . . . I look on the courts as a friend." Gettinger, "Cruel and Unusual" Prisons, 3 Corrections Magazine 3.5 (Dec. 1977), *quoted in Rhodes v. Chapman*, 452 U.S. at 361 (Brennan, J., dissenting). *Cf. Milliken v. Bradley*, 433 U.S. at 293 (Powell, J., concurring) (local school board and plaintiffs "have now joined forces apparently for the purpose of extracting funds from the state treasury"). *See Horowitz, supra* at 1294 ("An adverse decree that would require additional spending is also a weapon used by officials to augment their budget."). In view of this reality, the Seventh Circuit has cautioned that "district judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper v. Board of Education Comm'rs*, 814 F.2d 322, 340 (7th Cir. 1987).

The flip side of this coerced disruption of ordinary government decisionmaking, and also reinforcing the process, is the increase in judicial involvement in program administration that generally comes with implementation of a decree as time passes. If improvements are not apparent, the courts expand their efforts; and if improvements do seem apparent, the courts often conclude that it is because of their processes, thereby

warranting more of the same. Furthermore, once armed with a decree, judges appear to have an increasingly difficult time resisting the "natural tendency to believe that their individual solutions to often intractable problems are better and more workable" than those that are likely to come out of the political processes. *Bell v. Wolfish*, 441 U.S. at 562. But since the problems of prisons and mental hospitals "are not readily susceptible to solution by decree," *Procunier v. Martinez*, 416 U.S. at 405, those same judges frequently conclude that the decree is merely a starting point and that "real change" will require greater judicial involvement in such programs.

The clearest example of this expansionist approach can be seen in the use of judicial adjuncts in institutional cases. Thus, far from heeding this Court's repeated admonition about deferring to the expertise of the trained professionals who are actually responsible for operating institutional programs, see, e.g., *Procunier v. Martinez*, 416 U.S. at 404; *Youngberg v. Romeo*, 457 U.S. 307, 322 (1983), the district courts typically have brought in experts of their own, designating them as "masters" or "monitors." See *National Prison Conditions Litigation Survey* at 10 (60% of the states with decrees have masters or monitors); B. Porter, *Order by the Court: Special Masters In Corrections* 4 (1988) (nine states had entire prison system under the watch of a special master in 1988). These judicial adjuncts, which can be quite costly to States, see *National Prison Conditions Litigation Survey* at 10-11, are, for obvious reasons, even more likely than the courts to "become minutely involved in all aspects of correctional policy, ranging from the minimum allowable temperature of the food to the maximum number of days an inmate can be sentenced to segregation." *Prison Crowding* at 30. And just as their scope tends to expand, so too does their

power. Because they are the court's appointees, it is hardly surprising that, when a dispute occurs, "the court often defers to the[ir] judgment on compliance." *Ibid.* Consequently, satisfying the many demands of the court's experts becomes a major part of the politics of decree compliance.

Although the use of adjuncts is perhaps the clearest instance of this expansionist judicial approach, it is by no means the only one. The district courts have gone so far as to order prisoners released, *see Fambro v. Fulton County*, 713 F. Supp. 1426 (N.D. Ga. 1989); *Inmates of Allegheny County Jail v. Wecht*, 573 F. Supp. 454 (W.D. Pa. 1983), state institutions closed, *see, e.g., Homeward Bound, Inc. v. His-som Memorial Center*, No. 85-C-437-E (N.D. Okla., July 27, 1987), and the restoration of funds for services to non-classmembers when such funds had been diverted to meet decree requirements applicable to classmembers, *see Philadelphia Police & Fire Ass'n v. City of Philadelphia*, 705 F. Supp. 1103 (E.D. Pa.), *rev'd*, 874 F.2d 156 (3d Cir. 1989). These examples fully confirm the Ninth Circuit's observation that the remedial process in prison and mental health cases "may lead to excessive [judicial] involvement and a breakdown of institutional perspective." *Toussaint v. McCarthy*, 801 F.2d at 1089. *See also Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir.), *reh'g and reh'g en banc denied*, 815 F.2d 1034, *cert. dismissed*, 108 S. Ct. 44 (1987) (expressing concern about "consent decrees [having] a life of their own virtually outside the law").

c. The dynamic and conflict-producing nature of this remedial process further supports a flexible approach to modification motions. It is simply unrealistic to expect that decree provisions affecting the full range of prison or hospital operations can sensibly endure unchanged for a decade or more. On the contrary, "[t]he particular choice

of remedy can never be defended with any certitude. It must always be open to revision without the strong showing traditionally required for modifications of a decree . . . if the remedy is not working effectively or is unnecessarily burdensome." Fiss, *supra*, 93 Harv. L. Rev. at 114. Thus, purely as a practical matter, such decrees are properly regarded as quintessentially "provisional and tentative." *Swift*, 286 U.S. at 114. See Note, *The Modification of Consent Decrees In Institutional Reform Litigation*, 99 Harv. L. Rev. 1020, 1034 (1986) ("[t]he strong possibility that subsequent developments will render institutional reform relief outdated, ineffectual or counterproductive presents a compelling case for flexibility in modification").

In addition, a flexible approach to modification provides an important structural opportunity, by enabling the courts to ensure not merely that the decree remains properly tailored, but that the entire remedial process does so. Given the natural tendency of that process to become unhinged from the narrow constitutional issues that are its legitimate purview, this taking-stock function can be highly constructive. It allows the district court to shift back from an atypical, participatory function to its more traditional judicial function – *i.e.*, ascertaining the dimensions of the legal rights at issue and reconfiguring the decree in terms of those rights. Equally important, in contrast to a rigid modification standard, a flexible approach provides a meaningful opportunity for appellate review, which is likely to have a much-needed "disciplining" effect on the district courts. As the Ninth Circuit has explained, in the context of institutional remediation an appellate court "is in a better position to assure detached neutrality"; indeed, "other than appellate review, few effective controls check the district court's

power" in these circumstances. *Toussaint v. McCarthy*, 801 F.2d at 1089.

C. The Legitimate Finality Interest Implicated By Institutional Decrees Are Slight And Can Readily Be Accommodated Within the Structure of a Flexible Approach to Modification.

The two considerations that generally weigh against modification are unfairness and inefficiency. See, e.g., *Swift*, 286 U.S. at 119-20. Neither one is especially strong in the present context, let alone sufficient to overcome the compelling justifications for flexibility. First, a flexible modification standard is not unfair to plaintiffs, who likewise stand to benefit from such a standard and who will, in all events, receive what they are entitled to under federal law. Second, appropriate concerns about avoiding the relitigation of issues that have previously been decided, to the extent they exist, can be taken into account without impairing the requisite flexibility.

1. The suggestion that a flexible modification standard would somehow be unfair to plaintiffs is misguided. To begin with, such a standard would, of course, apply to plaintiffs and defendants alike. Thus, if the law evolves or is clarified to expand federal rights, plaintiffs would be entitled to a modification regardless of whether that legal ruling "directly overrule[d] any legal interpretation on which the [original] decree was based," Pet. App. 10a, or whether such a legal development could be said to have been "unforeseen" at the time the decree was entered, *Swift*, 286 U.S. at 119. It hardly seems plausible, for example, that notions of finality, even in a consent decree case, could be thought to bar modification of a decree that allowed double celling if this Court, only one day after its entry, held such a practice to be unconstitutional.

In any event, it is difficult to see why either party should be heard to complain that it is entitled to the benefits of an over- or under-inclusive decree on a prospective basis. To the contrary, the party opposing modification already will have received *more* than it was entitled to, probably for quite a few years. Moreover, in contrast to a case like *Swift* – which involved a prohibition on entry into several different lines of business – a decree in an institutional case is unlikely to create legitimate reliance interests that would be unfairly impaired by later modification.

2. The finality interests associated with the efficient use of judicial resources are also diminished in the present context. In the first place, the aspect of finality that concerns itself with bringing disputes to an end, *see, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), is, as a practical matter, of no consequence here. As noted earlier, a judicial decree in an institutional case, "in Churchill's phrase, signals not the end, nor even the beginning of the end, but only the end of the beginning of the remedial process." Rhode, *Class Conflict in Class Actions*, 34 Stan. L. Rev. 1183, 1187 (1982). An uninterrupted flow of adversarial litigation over compliance issues characterizes that process. *See, e.g., Halderman v. Pennhurst State School and Hospital*, 610 F. Supp. 1221, 1222 E.D. Pa. 1985) (district court in mental retardation case issued 500 orders and 28 published opinions during first 11 years of litigation that is still ongoing today); *United States v. Michigan*, 680 F. Supp. 928, 935-1064 (W.D. Mich. 1987) (reprinting 37 different enforcement orders in a consent decree case). As a result, a rule facilitating the modification of excessive decrees is likely to conserve overall judicial resources by limiting the scope of the court's involvement.

The remaining aspect of finality, which concerns itself with avoiding the inappropriate relitigation of issues that have already been decided, *see, e.g., Angel v. Bullington*, 330 U.S. 183, 192-93 (1947), is likewise of diminished importance here. The question raised by a modification motion in this context is simply whether the court's existing order is properly tailored to protect the plaintiffs' rights. By and large, as in this case, that question will turn on a legal analysis, thus requiring relatively little of the court's time, especially when viewed in light of the significance of these issues. That point is all the more true where a decree is the product of consent and, therefore, the court has never previously had to rule on such legal issues.

In those cases where a modification motion depends on factual issues, a court may reasonably rely on the presumptive validity of any prior findings. As time passes, however, that presumption should weaken, and the courts should more readily allow factual hearings concerning *present* conditions at a state facility. This approach should cover a significant number of consent decree cases as well, since many such decrees occur after liability findings are made. *See P. Cooper, Hard Judicial Choices: Federal District Court Judges and State and Local Officials* 336 (Oxford Univ. Press, Inc. 1988). And in consent decree cases where no liability findings have been made, the courts should be willing to hear modification motions based on factual claims, unless there is reason to believe that a party may have been sandbagging the court or its adversary – by agreeing to a consent judgment only to buy time to mount a factual defense or to disrupt its adversary's efforts. *Cf. Lawrence Manufacturing Co. v. Jonesville Cotton Mills*, 138 U.S. 552, 562 (1891). ("The prior decree was the consequence of consent, and not of the

judgment of the court, and, this being so, the court had the right to decline to treat it as *res judicata*."). See generally McConnell, *Why Hold Elections? Using Consent Decrees To Insulate Policies From Political Change*, 1987 Univ. Chi. Legal Forum 295, 306-07.⁵

II. A FEDERAL COURT CONSENT DECREE DIRECTED AT STATE PROGRAMS SHOULD BE SUBJECT TO THE SAME FLEXIBLE MODIFICATION STANDARD AS A CONTESTED REMEDY.

This Court has previously held that, when it comes to modifying equitable decrees, "[t]he result is all one

⁵ The area that appears to present the greatest potential for confusion in terms of factual findings relates to so-called "totality of conditions cases" in which the plaintiffs claim that the institution is so awful that it must be completely restructured (in prison cases) or dismantled (in mental health and retardation cases). See, e.g., *Duran v. Carruthers*, 885 F.2d 1485, 1490 (1989), *cert. denied*, 110 S.Ct. 865 (1990) (every aspect of a massive consent decree justified by the "totality of conditions" that plaintiffs alleged). In substantial measure, we think that such a view rests on a misunderstanding of Eighth Amendment rights, and that, purely as a matter of law, a much more careful tailoring approach is necessary when modification is sought. See *Ruiz v. Estelle*, 679 F.2d 1115, 1140 n. 98, 1153 (5th Cir. 1982), *cert. denied*, 464 U.S. 915 (1983) ("a generalized and vague conclusion concerning the totality of conditions is insufficient": "The 'totality of the circumstances' test does not authorize [a federal court] to reform all deficient prison conditions. The remedy must be confined to the elimination of those conditions that together violate the Constitution."). In any case, if a consent decree rests on allegations, without judicial findings, of pervasive abuse and harm to prisoners or patients, those factual matters should be resolved by the court if they are contested in a modification motion. The possibility that an issue of that magnitude could be covered up cosmetically is far too remote to justify preventing a State from securing at least one set of factual findings, based on adversarial testing, before such "facts" are allowed to support a massively intrusive federal court order on an indefinite basis.

whether the decree has been entered after litigation or by consent." *United States v. Swift & Co.*, 286 U.S. at 114. See also *System Federation No. 91 v. Wright*, *supra*. There is no reason to depart from that view here. A contractual theory for perpetuating overbroad federal court decrees governing state programs has all of the shortcomings of a finality theory, while also raising serious constitutional problems of its own.

A. A Flexible Approach To Modification Will Not Decrease The Likelihood of Settlement.

The principal argument against a flexible approach to consent decree modification in particular is that "[i]t would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to . . . arguably required more of the defendants than the absolute minimum they would be constitutionally required to do." Pet. App. 12a-13a. Although we doubt that such a rationale could justify continuing an overbroad decree in the face of the concerns that we have discussed above, we think the rationale is insupportable on its own terms.

There are a variety of strong incentives that lead the parties to settle institutional litigation. See generally Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. Ill. L. Rev. 579, 580-82 (describing "special incentives to settle" these kinds of cases); Resnik, *Judging Consent*, 1987 Univ. Chi. Law Forum 43, 63-85. From the plaintiffs' point of view, settlement provides the opportunity for substantial relief without awaiting years of trial and appellate proceedings. It also ensures the defendants' initial cooperation, which is certainly desirable, if not indispensable, in tackling the kinds of problems addressed in structural-

reform litigation. See, e.g., *United States v. City of Miami*, 614 F.2d 1322, 1333 (5th Cir. 1980) ("when agreement is reached by consent, voluntary compliance is more likely"), *rev'd on other grounds*, 664 F.2d 435 (5th Cir. 1981) (*en banc*). For the defendants, a settlement avoids spending millions of dollars on legal fees (the plaintiffs' as well as their own) and allows them to maximize their participation in formulating the decree, an opportunity that may be substantially diminished if plaintiffs prevail after years of contentious litigation.

Those incentives are sufficient to encourage reasonable settlements in institutional cases even without a guarantee that a decree, once entered, will be almost impossible to change. If anything, such rigidity is likely to make settlement less likely in these cases. As the Third Circuit has noted, "[a]n approach to the modification of a complex affirmative injunction which over-emphasized the interest of finality at the expense of achievability would inevitably make defendants wary of any decree imposing more than the bare minimum of affirmative obligation." *Pennsylvania Welfare Rights Organization v. Shapp*, 602 F.2d at 1120. See also Memorandum from the Attorney General, Department Policy Concerning Consent Decrees and Settlement Agreements (Mar. 13, 1986) (strictly limiting authority of Justice Department lawyers to settle cases because of concerns about inflexibility of remedial decrees), reprinted in relevant part at 54 U.S.L.W. 2492 (Apr. 1, 1986).

B. A Contractual Theory Does Not Justify Perpetrating A Decree Governing State Operations.

The second rationale relied on by proponents of a rigid modification standard is that the State should be required to live up to its contractual agreements. See *Pet.*

App. 12a ("Defendants' agreement in this case was a firm one"). That argument is flawed in several respects. Not only does it misperceive the range of interests affected by a judicial decree but, more fundamentally, such an approach is inconsistent with basic notions of federalism and the Eleventh Amendment. This Court's decision in *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), does not support a different conclusion.

1. Reliance on contractual principles to justify a consent decree in the face of a modification motion ignores the significance of the fact that such a decree is not merely a private agreement, but also an enforceable court order. For that reason, this Court has indicated that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *System Federation No. 91*, 364 U.S. at 651. Thus, the contractual underpinnings of a consent decree should not make it any less subject to modification than any other ongoing court order.

On the contrary, there are particularly strong reasons not to accord contract principles any weight in the present context. First, the federal courts have a fundamental institutional interest – especially given the scope, complexity and longevity of these kinds of cases – in "limiting the range of disputes in which [they] can be dragged by means of an overly broad consent decree." *Sansom Comm. v. Lynn*, 735 F.2d 1535, 1544 (3d Cir. 1984) (Becker, J., concurring). See also *Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 341 (7th Cir. 1987) ("[e]very hour consumed administering a consent decree is an hour taken from other litigants, who must wait in a longer queue"). Second, regardless of the parties' consent, an equity court must always take cognizance of the "public interest" in ruling on a modification motion. That interest is uniquely

affected by a decree that shelters important policy decisions from democratic adjustment. See, e.g., *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir.) cert. denied, 464 U.S. 915 (1983) (Friendly, J.) (consent decrees "in institutional reform litigation" should be subject to a flexible standard of modification "to accomodat[e] . . . a wider constellation of interests than is represented in the adversarial context of the courtroom"). Lastly, as we now show, reliance on the consent of state officials to bind the State to an ongoing federal court decree violates principles of federalism and the Eleventh Amendment.

2. A fundamental tenet of democratic government is that "[f]uture lawmakers have just as much power to depart from the decisions of their forebears as their forebears had to make the decisions in the first place." McConnell, *supra*, 1987 Univ. Chi. Legal Forum at 296. Thus, those who are currently in office "can govern according to their discretion . . . while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" *Stone v. Mississippi*, 101 U.S. 814, 820 (1879). See also *Chicago & Alton R.R. v. Tranberger*, 238 U.S. 67 (1915). Based on that recognition, this Court has consistently refused to apply the Contract Clause to enforce state agreements that commit to a particular exercise of traditional governmental powers. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23-24 (1977); *El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-38 (1934).

To the extent that a federal court consent decree goes beyond the enforcement of federal rights, therefore, it should be revocable by the same process that it was adopted - i.e., an appropriate motion in federal court.

Strictly in terms of contract principles, such agreements should be deemed unenforceable because every State's law prohibits its officers from bargaining away the sovereign powers of their successors. *See generally* Easterbrook, *Justice and Contract in Consent Judgments*, 1987 Univ. Chi. Law Forum 19, 33-40. That is obviously all the more true when, as in institutional cases, the defendants bind not only the executive but also current and future legislatures, which are not parties to the litigation but must nevertheless live by, as well as pay for, the decree. More fundamentally, to insist that such a contract be enforceable on the ground that it was embodied in a court order completely ignores core sovereign interests of the States, without serving any legitimate, let alone overriding, federal interest. *See Note, Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796 (1988).

Such insistence would also violate the Eleventh Amendment expressly. The sole justification for the ruling in *Ex Parte Young*, 209 U.S. 123 (1908), is that a narrow exception to the Eleventh Amendment "was necessary to permit the federal courts to vindicate federal rights." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. at 105. To achieve that result, the Court relied on the "fiction" that state officials, when acting beyond constitutional limits, are not the State and thus may be sued in federal court. But it would completely pervert the legitimate purposes of both the exception and the fiction if they were interpreted to allow defendant state officials to bind the State to *extra-constitutional* measures. *See Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) (enforcing overbroad consent decree agreed to by defendant officials would "result in an *ultra vires* judicial attempt to

bind a nonparty, the state, to the litigation and would create an impermissible constitutional confrontation between the federal court and the state legislature").

3. The decision in *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), does not support a contrary view.⁶ In particular, the language from *Local 93* relied on by the lower courts (*see n. 6, supra*) – i.e., that “a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial,” 478 U.S. at 525 – cannot properly be extended to cases involving modification motions.⁷ By its terms, that language speaks only of the “entry” of a consent decree, which takes place at a time when the parties support the decree and, consequently, there is typically neither a reason nor a meaningful way for the district court to subject it to adversarial testing. Thus, a standard for authorizing entry of a consent decree that does not require federal courts to impose the more exacting tailoring principles applicable in

⁶ Two circuits have relied on *Local 93* to deny modifications of legally excessive decrees in prison cases. *See Duran v. Carruthers*, 885 F.2d at 1491; *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1987). *But see Lelsz v. Kavanagh*, 807 F.2d at 1252; *Washington v. Penwell*, 700 F.2d 570, 574 (9th Cir. 1983) (pre-*Local 93*).

⁷ The specific standard adopted in *Local 93* requires that “a consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must ‘com[e] within the general scope of the case made by the pleadings,’ and must further the objectives of the law upon which the complaint was based.” 479 U.S. at 527.

disputed litigation rests on the practical realities of the situation. At most, that is what *Local 93* stands for.⁸

In contrast to the situation discussed in *Local 93*, however, when a State moves to modify, it can no longer properly be said that "the parties' consent animates the legal force of a consent decree." 478 U.S. at 525. At that point, unless (contrary to our earlier submission) "contract" principles require that consent can never be revoked once given in federal litigation, the *future* legitimacy of the decree must turn on "the law which forms the basis of the claim." *Ibid.* Cf. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 558, 576 n.9 (1985) ("Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the city").⁹

⁸ It is not even clear that *Local 93* intended to establish a general standard for approving entry of federal consent decrees in all cases. The opinion focuses on the particular statutory policies of Title VII, *see* 478 U.S. at 513, 515, 517 n.8, thus suggesting that its holding was limited to that context. Moreover, the Court's words – stating that "a federal court is not *necessarily* barred from entering a consent decree *merely because* the decree provides broader relief than the court could have awarded after trial" (478 U.S. 525 (emphasis added)) – hardly suggest that it was announcing a broad affirmative principle. To the contrary, the Court further stated that, even if a decree satisfied the *necessary* conditions (set out in n.7 *supra*), it still might "otherwise [be] shown to be unlawful." 478 U.S. at 526.

⁹ The Court in *Local No. 93* itself recognized that the standards governing entry of a decree were different from the standards governing modification. It noted that, while entry of a consent decree does not implicate § 706(g) of Title VII, a ruling on a motion to modify a consent decree does implicate § 706(g). 478 U.S. at 523 n.12. And the Court carefully distinguished from the entry case before it (478 U.S. at 526-28) two

(Continued on following page)

In any event, the Court in *Local 93* had no occasion to consider the Eleventh Amendment or federalism issues presented in this case. Aside from the fact that the governmental entity there involved was a city, not a State, that entity *supported* the decree. The Court also treated the city no differently from a private party, reflecting the fact that Title VII does not distinguish between such employers. Indeed, in enacting Title VII, Congress expressly abrogated the States' Eleventh Amendment protection. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). By contrast, Congress has left that protection, and the federalism concerns it reflects, intact in institutional cases like this one. See *Quern v. Jordan*, 440 U.S. 332 (1979). For those reasons as well, *Local 93* is not properly read to authorize the continuation of an overbroad consent decree on contract grounds.

CONCLUSION

The amici states respectfully urge this Court to reverse the decision of the court of appeals.

Respectfully submitted,

Of Counsel:

JOEL I. KLEIN

PAUL M. SMITH

RICHARD G. TARANTO

ONEK, KLEIN & FARR

2550 M Street, N.W.

Suite 350

Washington, D.C. 20037

CHARLES W. BURSON

Attorney General & Reporter

State of Tennessee

MICHAEL W. CATALANO

Deputy Attorney General

450 James Robertson Parkway

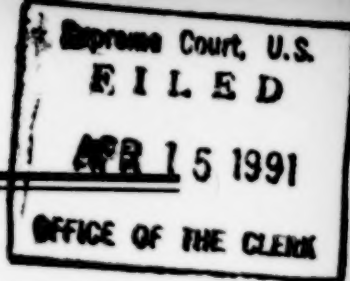
Nashville, Tennessee 37243-0485

(615) 741-3499

(Continued from previous page)

decisions that involved motions to modify – *System Federation No. 91, Ry. Employers' Dep't v. Wright, supra*, and *Firefighters Local Union No. 1784 v. Stotts, supra*.





IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO, Sheriff of Suffolk County, et al.,
Petitioner,

—against—

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

THOMAS C. RAPONE, Commissioner of Correction, et al.,
Petitioner,

—against—

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

**BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

ROBERT ABRAMS
*Attorney General of the
State of New York*
120 Broadway
New York, New York 10271
(212) 341-2611

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

BARBARA B. BUTLER*
Assistant Attorney General
Of Counsel

* Counsel of Record



TABLE OF CONTENTS

	PAGE
THE INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	5
APPENDICES	
APPENDIX A	1a
APPENDIX B.....	1b
APPENDIX C	1c

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Doe v. Cuomo</i> , (83 Civ. 4068 S.D.N.Y.) (LLS)	4, 5
<i>Keith v. Volpe</i> , 784 F.2d 1457, (9th Cir. 1986).	3
<i>New York State Association For Retarded Children Inc. v. Carey</i> , 706 F.2d 856 (2d Cir.), <i>cert. denied</i> , 464 U.S. 915 (1983)	2, 3, 5
<i>Pena v. New York State Division for Youth</i> , 708 F.2d 877, 880 (2d Cir. 1983)	3
<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	2
<i>Philadelphia Welfare Rights Org'n v. Shapp</i> , 602 F.2d 1114 (3d Cir. 1979), <i>cert. denied</i> , 444 U.S. 1026 (1980)	3
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974).	2
<i>Todaro v. Coughlin</i> , (74 Civ. 4581) (S.D.N.Y.)	4, 5
<i>Webb v. Dalsheim</i>	4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 90-954; 90-1004

ROBERT C. RUFO, Sheriff of Suffolk County, et al.,

Petitioner,

—against—

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,

Respondents.

THOMAS C. RAPONE, Commissioner of Correction, et al.,

Petitioner,

—against—

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,

Respondents.

**BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

**THE INTEREST OF AMICUS CURIAE AND
SUMMARY OF ARGUMENT**

Every state has a strong interest in directing the operations of its institutions, departments and programs. Thus, when those operations are governed, in whole or in part, by the provisions of a consent decree entered into in a federal court action, a state also has a strong interest in the standard to be applied by federal courts upon any motion to modify the

decree. What is at issue is not simply abstract principle but a matter of practical concern to the officials responsible for providing essential state services. New York State, as *amicus*, submits this brief to set forth for the Court its experience with consent decrees since the United States Court of Appeals for the Second Circuit adopted the standard for modifying consent decrees in institutional reform litigation set forth in *New York State Association For Retarded Children Inc. v. Carey*, 706 F.2d 856 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (hereinafter "*Retarded Children*"). This experience, New York submits, supports the position that a standard of flexibility should govern the oversight and management of injunctive decrees in institutional litigation.

ARGUMENT

These cases present issues of fundamental importance concerning the appropriate role of the federal courts in directing the operations of state institutions or other departments of state government. Managing institutions is among the most difficult functions of state governments. It requires "expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Procurier v. Martinez*, 416 U.S. 396, 404-05 (1974); *see also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

To be sure, the courts must insist that states obey all constitutional and other federal mandates in operating their institutions. An inflexible court decree, however, prevents a natural evolution in management techniques and limits the available range of responses required when dealing with the many complex and sometimes dangerous situations that arise each day in the administration of institutions. Accordingly, as the Second Circuit recognized, standards of flexibility should govern the oversight and management of an injunctive decree:

It is well recognized that in institutional reform litigation such as this, judicially-imposed remedies must be open to adaptation when unforeseen obstacles present themselves, to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom.

Retarded Children, 706 F.2d at 969; accord, *Pena v. New York State Division for Youth*, 708 F.2d 877, 880 (2d Cir. 1983); see also *Philadelphia Welfare Rights Org'n v. Shapp*, 602 F.2d 1114 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980). Thus, where a consent decree concerning an institution contains omissions, or, in light of subsequent experience, proves inadequate or unyielding, a court may modify the judgment to fill in gaps, cure ambiguities or remedy inadequacies. *Keith v. Volpe*, 784 F.2d 1457, 1460 (9th Cir. 1986).

In the eight years since the Second Circuit adopted the flexible standard enunciated in *Retarded Children*, New York State has had extensive experience in litigating, settling and effectuating decrees in institutional cases. There are currently some twenty ongoing consent decrees or stipulations of settlement involving the management of New York State institutions. (A list of these decrees, with an outline of their provisions, is attached hereto as Appendix A). Of these, some fourteen decrees were entered into after the Second Circuit decided *Retarded Children* on March 31, 1983. Also, in those same years, only four such institutional cases have gone to trial.¹ The fear expressed by the district court below, that

1 These cases are *Alston v. Coughlin*, 668 F. Supp. 822 (S.D.N.Y. 1987) (Inmates at Fishkill Correctional Facility claimed that the totality of conditions at the facility violated the Eighth Amendment. Judgment was in favor of defendants); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (Rastafarian inmates claimed their First Amendment rights to practice their religion were being violated. The court found for defendant except for defendant's directive that the inmates be required to cut their hair); *Griffin v. Coughlin*, 743 F. Supp. 1006 (N.D.N.Y. 1990) (Inmates in protective custody at Clinton Correctional Facility challenged their conditions of confinement. The court found in favor of defendants except to require that defendants provide private meet-

a flexible standard for modification would impede settlement has, in the case of New York State, simply not materialized.

At the same time, while certain of the decrees are fairly simple, e.g., *Webb v. Dalsheim*, (Appendix A at page 16) regarding wearing beards for religious reasons, or *Dumont v. Coughlin*, (Appendix A at page 3) regarding publications which can be received by inmates, by and large the decrees set up detailed and extensive systems for the operation of the subject institutions. Thus, for example, *Doe v. Cuomo*, (83 Civ. 4068 S.D.N.Y.) (LLS), contains provisions for the care and treatment of patients at Manhattan Psychiatric Center (A copy of the decree is attached as Appendix B), and *Todaro v. Coughlin*, (74 Civ. 4581 S.D.N.Y.) (RJW), contains provisions for the delivery of medical care at Bedford Hills Correctional Facility (A copy of the Stipulation of Settlement is attached as Appendix C).

Doe v. Cuomo was litigated for more than four years before settlement was reached. The settlement which was developed includes staffing, staff training, supervision, clinical care, consultations, nursing care, programs and activities, capital renovations, record keeping and monitoring. *Todaro v. Coughlin* began in 1974 as *Todaro v. Ward*. In 1977, after trial, the court entered judgment directing defendants to take several specific measures to remedy the constitutional violations found in its decision. In 1988, plaintiffs moved to find defendants in contempt and for modification of the judgment to enlarge the scope of the judgment, in large part with respect to inmates with AIDS. After extensive and prolonged negotiations, in May 1989, the parties reached an agreement as to a modification of the judgment. The modifications included establishing systems to implement and track physician orders and to provide care to plaintiff's between screen-

ings for such inmates with their spiritual advisors); *Ortiz v. Coughlin*, 85 Civ. 1669, (S.D.N.Y.) (KTD) (Inmates at Sing Sing Correctional Facility claimed that the fire safety provisions at the facility violated the Eighth Amendment. In June, 1990, judgment was entered in favor of defendants.

ing sessions. The modification also provides for increased staffing levels. The settlements in *Doe* and *Todaro* are typical of those entered into which concern the operations of institutions. As they and others similarly complex demonstrate, flexibility to modify particulars is a vital component of the management process for these institutions.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the First Circuit should be reversed and the case remanded for application of standards consistent with *Retarded Children*.

Dated: New York, New York
April 15, 1991

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
120 Broadway
New York, New York 10271
(212) 341-2611

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

BARBARA B. BUTLER*
Assistant Attorney General
Of Counsel

* Counsel of Record.



APPENDICES



APPENDIX A

1. *Anderson v. Coughlin*, 80 Civ. 3037, S.D.N.Y. Judge Brieant, effective 1984. This case concerns medical care, access to courts and exercise in special housing units at four correctional facilities—Sing Sing, Fishkill, Green Haven & Bedford Hills. Special housing units house inmates in disciplinary segregation and awaiting disciplinary proceedings.

Exercise—The facilities must give a full hour of exercise each day. There must be exercise areas, certain clothing and equipment must be available. The equipment includes a basketball hoop, basketball, bench, checkers and deck of cards. Depending on the facility, at least two, four or six inmates should be allowed to exercise together in each area unless there is a risk that someone will be harmed if the inmates have communal exercise.

Access to legal materials and assistance—Depending on the facility, there will be a mini-law library adjacent to the special housing unit ("SHU") from which an inmate can borrow up to 5 books a day or access to the facility's law library. Inmates can get books or assistance from an officer assigned to the law library to discuss legal problems. Facilities must also provide access to photocopying, typing, a notary and necessary legal supplies.

Record keeping—The facilities must keep certain records of SHU inmates' exercise and access to legal materials and assistance.

Medical Services—Sing Sing and Fishkill Correctional Facilities must provide for a medical assessment upon admission which includes a review of the inmate's medical records, a physical evaluation, behavior assessment; inquiry into any chronic or disease; and inquiry into any outstanding orders special diets, specialist consultations medications and therapeutic devices. Health staff shall conduct on the unit encounters daily according to specific procedures. The inmate must be taken to the clinic if he cannot be treated on the unit, that DOCS must note in the inmate's health records each time he

is seen, that DOCS must review the inmate's records in deciding how to treat him and that he must receive health care services equivalent to that given to general population inmates.

2. *Dean v. Cuomo*, 84 Civ. 1528 S.D.N.Y. Judge Kram. The case concerns the provision of dental care to inmates at Bedford Hills Correctional Facility. The settlement, effective February 26, 1987, provides:

Treatment Priorities shall be established for all patients examined in the Bedford Hills dental clinic, other than those who are not in need of treatment.

Access To Dental Care And Follow-up Treatment is to be provided pursuant to emergency and sick call procedures.

1. Dental Emergencies—Each patient requesting emergency dental assistance shall be evaluated, and examined in accordance with certain procedures. These procedures require time frames for evaluation, examination and treatment, protocols and record keeping.

2. Dental Sick Call—Inmates shall have an opportunity to request dental sick call in writing each day, time frames for examination are set up and provisions for informing inmates of their treatment plan are established.

3. Follow-up Care, including treatment by an outside provider shall be provided within certain time frames and provisions for informing a patient are established.

Procedures are also established for when a patient shall be deemed to have refused treatment

Implementation provisions include provisions for adequate and properly functioning facilities and equipment, maintaining individual dental records, resolving complaints through the existing grievance mechanism, and providing orientation materials.

Compliance Supervision provisions include maintaining records, separate from patient dental charts, relating to prosthetic services, all requests for or scheduling of dental care

and treatment of patients, and patients seen and procedures performed on a daily basis, Compliance also includes a quality assurance mechanism to be employed quarterly by dentists who are not employed at Bedford Hills which shall follow a protocol, periodic reports to counsel for plaintiffs and a right, by plaintiffs attorneys and experts, to inspect all dental care areas of Bedford Hills and to review all records and documents.

3. *Doe v. Cuomo*—See Appendix B.

4. *Dumont v. Coughlin*, 82 CV. 1049; *Smith v. Coughlin*, 82 VB 426, E.D.N.Y., Judge McCorn, effective March 9, 1983. This settlement governs an inmate's rights to receive publications at Auburn and Clinton Correctional Facilities. It:

1. Establishes lists of allowable publications.
2. Revises Directive 4572 guidelines on publications.

3. Establishes a Media Review Committee and sets its due process functions to determine allowability of publications where challenged.

5. *Foe v. Cuomo*, 75 Civ. 1029, E.D.N.Y. Judge Bartals, effective November 15, 1988. This case involves the care and treatment of clients at Bronx Psychiatric Center. The stipulation of settlement provides:

1. Bronx Psychiatric Center agrees to maintain accreditation from The Joint Commission on Accreditation of Hospitals (JCAH) during the pendency of the stipulation. Defendants shall immediately notify plaintiff's counsel in writing of any changes in BPC's accreditation status.

2. Bronx Psychiatric Center agrees to adhere to Bronx Psychiatric Center Quality Assurance Plan and its subsequent amendments.

3. The BPC quality assurance plan shall be amended or supplemented to include

(a) Enhanced monitoring and review of programs and activities in the areas of nursing; social work, dental care, speech/language and audiology, and vocational rehabilitation, including oversight of therapies and services provided by sources outside the hospital;

(b) Annual medical review of a sample of records by OMH personnel from outside BPC or by an independent organization or entity;

(c) An internal record review process on a structured, systematic basis across all units and professional disciplines;

(d) A procedure for ensuring that problems and deficiencies noted through all quality assurance activities are systematically addressed and corrected.

(e) Regular and continuing review of the utilization of psychotropic medication, seclusion, quiet rooms, physical and mechanical restraint, and other aversive procedures or techniques.

Mentally Retarded Population

1. Bronx Psychiatric Center will refer patients to the Office of Mental Retardation and Developmental Disabilities (OMRDD) which will offer placements in an appropriate OMRDD program and will also continue to provide programming for these patients appropriate for a mentally retarded population while these patients remain at Bronx Psychiatric Center awaiting an OMRDD placement.

2. Bronx Psychiatric Center may in the future admit individuals from OMRDD for the purpose of stabilizing their psychiatric condition.

Census Reduction

1. Bronx Psychiatric Center undertakes and agrees to maintain the census at a program goal opportunity (PGO). The census on any given ward may reach up to 10% over the PGO and still be deemed in compliance with the terms of this

settlement, so long as the census as a whole does not exceed the PGO of the facility by more than 8%.

2. Provisions are also established for planning census reduction, including plans for alternate placements. Counsel for the plaintiffs will be notified of any changes creating new wards, closing current wards, or reconfiguring wards in order to reflect the changing patient population.

3. In addition the settlement provides for grievance procedures, staff ratios, furnishings, proper ventilation and heating, privacy in sleeping and personal hygiene areas, a treatment planning process, progress notes and discharge planning, programming, vocational training, recreation, medical and dental care and suicide prevention measures.

6. *Frazier v. Ward*, 73 CV 306, N.D.N.Y. Judge Foley, effective June 21, 1977. This case concerns Clinton Correctional Facility's SHU search procedures and exercise provisions. The provisions of the order are:

1. Inmates cannot have anal or genital searches performed upon except or reasonable cause or upon entry or departure from the facility

2. Sets standards for searches when authorized.

3. Mandates one hour of outdoor exercise per day weather permitting.

7. *Honeycutt v. Coughlin*, 80 Civ. 2530, S.D.N.Y. Judge Canella, effective April 3, 1984. This case involves conditions of confinement for Protective Custody inmates at Green Haven Correctional Facility. A consent judgment provides:

1. Inmates will be permitted outside their cells every day between 7:30 a.m. and 3:00 p.m., except for times at which the count is taken. At least two of these hours will be for recreation, at which time plaintiffs will go to the outside yard or, if they choose not to go to the yard, they will be locked in. If the weather is very bad, recreation in the yard can be limited to one hour, or required to be provided on the gal-

lery. The yard will be maintained in good condition and will contain some recreation equipment. There will also be some equipment, including a television, on the gallery. The television may be used during all out-of-cell hours.

2. Breakfast and lunch will be provided, for those who wish to eat outside their cells, on the gallery.

3. There shall be enough officers on the unit so that plaintiffs may be out of their cells safely.

4. At least five plaintiffs will be given jobs on the gallery.

5. Self-study courses, and teachers to assist with these, will be available on the protective custody unit.

6. Inmates may receive at least four law library books a day and retain them for at least twelve hours. Inmates will be entitled to use any law library materials and to receive them within twenty-four hours of a request, unless the item is in use, in which case it will be reserved for the requesting plaintiff.

7. The Department will study the possibility of setting up a vocational class or required to establish a vocational class or program if protective custody inmates are not interested in participating.

8. An inmate law library clerk, clear for security purposes, will make daily rounds of the protective custody unit and assist those plaintiffs who require assistance. A Spanish-speaking law clerk will be available on request.

9. The services of a notary public will be available on the unit within forty-eight hours of a request (unless the request was made on a week-end or holiday).

10. Inmates shall have the same access to photocopying and typing services as general population inmates.

11. Writing materials shall be available.

12. General library materials shall be available. At least two copies of a major daily newspaper and two copies of two weekly magazines shall be available.

13. Inmates will not be able to make personal appearances before the grievance committee, but, in all other respects, access to the grievance procedure will be the same as it is for general population inmates.

14. Catholic, Protestant and Muslim clergy each will tour the unit once a week and counsel, in privacy, any inmate who wishes such counselling. A rabbi will visit the unit, also for private counselling, when an inmate makes a written request to see a rabbi. Community Chaplains also will visit the unit, on written request by a plaintiff. At least one Christian and one Islamic service will take place on the unit weekly.

15. Food will be served at appropriate temperatures and will be the same as that served to the general population. Steps will be taken to assure that plaintiff's food is not tampered with.

16. No inmate shall be housed in a cell that does not have running water or a working toilet.

17. Inmates will have the option to go to the package room, under escort, to view the opening of their packages or to receive the packages, already opened, on the protective custody unit.

18. Inmates will be entitled to the same telephone privileges as are inmates in general population and telephone calls will be made outside the earshot of correctional personnel.

19. Inmates will be eligible for trailer visits during two normal visit cycles per year; eligibility will be determined according to the same criteria used for general population inmates.

20. Inmates will receive credit for one program point, toward temporary release, every six months.

21. The mere fact of protective custody status will not be a basis for denial of parole release.

22. Protective custody inmates who are not victimprone will not be housed on the protective custody unit. However,

in an emergency, protective custody inmates who are not victimprone may be housed on the unit for no more than three days. When this occurs, non-victim prone inmates will be kept in the front of the gallery and will be kept separated from plaintiffs.

8. *Hurley v. Coughlin*, 77 CV 3847, S.D.N.Y. Judge Carter. This case involves strip searches and strip frisks at all correctional facilities. After a trial on the merits the Court issued an opinion, 549 F. Supp. 174, which all parties determined to be unworkable. Therefore, a settlement was reached in July, 1983.

It provides:

A. Definitions of

1. *Strip Search*—A search of an inmate's clothes once they are removed and a visual inspection of the inmate's naked body.

2. *Strip Frisk*—A search of an inmate's clothes and body including body cavities.

B. Circumstances when a strip search frisk may be done.

1. *Probable Cause*: a. Where a correction officer has reasonable grounds to believe that an inmate is hiding contraband on his body or in a body cavity area, the correction officer must report this finding to a officer ranked Sergeant or above.

b. That officer must make a determination that there are reasonable grounds for belief that the inmate should be strip searched or strip frisked, and, if he makes an affirmative determination, the officer may conduct a strip frisk or strip search.

c. The officer must thereafter set forth the basis for probable cause in a signed writing, which states the inmate's name and number, the time place and scope of the strip search or strip frisk, whether force was used, the name and ranks of

person(s) conducting and/or present at the strip search or frisk search, and the results of the strip search or strip frisk.

2. *Transfer*: When an inmate is transferred from one DOCS facility to another, he/she may be strip frisked/ searched at the sending facility, but not, unless there is probable cause, at the receiving facility.

3. *Contact Visits*: All inmates may be strip frisked or strip searched after a contact visit, but not, unless there is probable cause, after non-contact visits.

4. *Attorney Visits*: Inmates have the option of having non-contact visits with attorneys.

5. *Special Housing Units*: On initial entry to a Special Housing Unit, used for disciplinary or protection purposes, an inmate may be strip frisked or strip searched.

6. *Psychiatric Housing*: On admission to psychiatric housing, a strip frisk may be conducted, by medical personnel if determined to be necessary for psychiatric reasons by a qualified medical provider. Otherwise, the health care provider should conduct a full disrobed physical examination. If that does not occur the P.S.U. correction officer(s) may conduct a strip search.

7. *Unsupervised Leave*: An inmate may be strip frisked/ searched upon return to a correctional facility from temporary release, furlough, work release.

8. *Supervised Leave*: When an inmate is leaving on a supervised outside trip, an officer may strip frisk search the inmate when it appears the inmate has (a) notice of the date of the trip and/or (b) a history of escape, absconding or attempting to escape or abscond or (c) a history of possession of contraband used or attempted to be used for the purpose of escape, attempted escape, assault on a correction officer, or attempted assault on a correction officer. If, during a supervised outside trip, the escorting officer loses sight of the inmate or his hand movements, and the officer believes the

inmate has contraband, the inmate may be strip frisked or strip searched upon return to the facility.

9. *Facility or Areawide Searches*: Strip frisks searches shall not be conducted as a part of a general search of a facility or portion thereof except:

a. During a routine block search, an inmate may be strip searched or subjected to an inspection of his mouth, ears, hair, hands, armpits and feet.

b. During an entire or partial facility search undertaken in response to a major threat to the security of the facility, and the search having been approved by the Commissioner or Deputy Commissioner, a strip frisk may be conducted.

10. *Procedures*: When strip frisks or strip searches are conducted:

a. the officer or employee shall take steps to insure that the strip search/frisk is conducted in the most dignified and least intrusive manner possible.

b. Areas may be designated where multiple strip frisks or strip searches can be conducted at the same time as long as there are partitions or curtains separating each area and inmate from others.

c. All strip searches or strip frisks will be conducted in areas which are adequately clean and heated and where inmates can keep their clothes off the floor.

d. Strip searches/frisks will be conducted by an officer of the same sex as the inmate except in psychiatric housing, where a qualified male or female medical provider shall perform any strip frisk.

e. The strip search or strip/frisk will be conducted by one officer and, if necessary, a supervisor to observe, except:

1. When a facility emergency requires the inmates be held and searched in groups; or

2. When there is a reason to believe that the inmate will actively resist the strip search or strip frisk, thereby forcing the presence of other officers.

9. *Inmates of the North Gallery v. Smith*, Civ-77-187 W.D.N.Y., Judge Curtin. Effective April 11, 1980. This is a Stipulation concerning the North Gallery of the (SHU at Attica Correctional Facility) controlling procedures for:

1. Placement of inmates on the gallery.
2. Weekly change of clothes.
3. Sanitation procedures and materials supply.
4. Amount of legal materials and supplies.
5. Hygiene items supply.
6. Adequacy of heat and ventilation
7. Exercise.
8. Obtaining reading materials.
9. Access to Law Library.
10. Access to religious articles.
11. Deprivation of any of the above.

10. *Jenkins v. Coughlin*, CV-88-0782T, W.D.N.Y.. Judge Telesca. This case concerns the provision of dental care to inmates at Alton Correctional Facility. It was settled in July 1990. The settlement contains provisions similar to those of *Dean v. Coughlin, supra*. In addition, it has provisions for oral surgery and for the delivery of care to inmates in restricted housing.

11. *Jones v. Coughlin*, 80 Civ. 5130, S.D.N.Y. Judge Carter, Consent Judgment effective May 20, 1983. This case involves fire safety conditions in the Hospital Building at Bedford Hills Correctional Facility. It:

1. Provides for a sprinkler system, roof repair, fire retardant construction, fire doors, sealing of certain rooms, con-

struction of cell doors and viewing windows, certain regulations in the nursery, smoke barriers.

2. Requires establishment of evacuation routes.
3. Mandates good working order maintenance of fire systems.
4. Regulates types of mattresses to be used.
5. Establishes fire safety training for staff and inmates including fire drills, fire brigade.
6. Assures access to outside fire department.
7. Requires duplicate key to be maintained by personnel.

12. *Koslowski v. Coughlin*, 81 Civ. 5886; *Sims v. Coughlin*, 81 Civ. 2355, S.D.N.Y. Judge Stewart, effective June 10, 1983. This Class action concerned due process retraction of visitation rights at all correctional facilities. A stipulation of settlement was entered after a decision finding the Department of Correctional Service directive unconstitutional.

The Settlement provides:

1. The Superintendent of a facility is to review any suspension or revocation of visitation for any inmate or visitor.
2. Plaintiff's counsel is to get copies of revocations and suspensions once a month.
3. New procedures are appear in directive 4403.
4. An inmate or visitor accused of misconduct is to get written notice of charge.
5. An appeal of a revocation and suspension can be taken. If the suspension and revocation is less than 6 months, a hearing is to be held.
6. A visit misbehavior code is established which sets forth the various types of prohibited behavior and the range of punishment for each.

13. *Lewis v. Coughlin*, 82 Civ. 5115, S.D.N.Y. Judge Broderick. Order dated November 9, 1984. This case concerns urinalysis testing at Bayview Correctional Facility. It provides:

1. An inmate may be ordered to submit a urine sample only under certain circumstances:

- a) when there is reason to believe that the inmate is under the influence of illicit drugs or alcohol;
- b) When the inmate returns from a furlough, family reunion, work or temporary release program, community service or other outside work detail;
- c) when it is part of a random testing of entire population or identifiable unit.

2. Requires identification of inmate and written approval for the test.

3. No inmate shall be required to give more than five random urine samples in any twelve month period.

4. Each inmate ordered to provide a specimen for urinalysis testing shall be informed of the underlying reason.

5. Specific procedure of obtaining specimen.

6. Specific procedure of processing specimen.

7. A positive urinalysis result may be used in a disciplinary hearing.

8. All results obtained in the course of the Urinalysis Testing Program shall be assembled and retained on a "Daily Log" form.

9. Any inmate who may be confined in a cell or SHU upon notification to the facility of a positive test, prior to any disciplinary proceeding, must be interviewed within 24 hours of being segregated.

14. *Milburn v. Coughlin*, 70 Civ. 5077, S.D.N.Y. Judge Ward, effective August 20, 1982. Medical care at Green Haven. Stipulation for entry of final judgement.

1. Sets minimum staffing, hours per week for Medical Unit.
2. Requires certain equipment to be maintained on site.
3. Establishes procedures for access to M.D.'s.
4. Fixes sick call procedures.
5. Sets diagnostic test and X-ray systems and follow up.
6. Assures access to specialists within fixed time periods.
7. Establishes minimum requirements and procedures for dental care.
8. Requires inmate orientation.
9. Sets review of medical records for arriving inmates.
10. Categories inmate with chronic diseases.
11. Systemizes medical record maintenance.
12. Regulates security interaction with medical care.
13. Establishes permissible duties for inmate health care workers.
14. Vests Medical Director with final authority for infirmary admissions.
15. Creates the Unit for the Physically Disabled.
16. Requires pharmacy profiles on all inmates.
17. Assures special medical diets.
18. Requires provision of therapeutic devices within time limits.
19. Assures availability of emergency transport vehicle.
20. Creates periodic chart reviews.
21. Provides for continuing medical education for staff.
22. Assures continuity of care for inmates transferred in and out of G.H.

23. Creates periodic outside audits by Montefiore Hospital.

Supplemental Stipulation:

24. Creates priority system for hospitalizations.

25. Expands sick call requirements.

15. *New York State Association for Retarded Children v. Cuomo*—706 F.2d 856 (2d Cir.) cert. denied, 464 U.S. 915 (1983). Upon remand to the district court, the parties entered into a stipulation of settlement in February 1987. The stipulation set up a schedule for closing Staten Island Developmental Center and the Karl D. Warner Center and for transferring people from the centers to other facilities. The Stipulation established qualifying facilities for transfer, procedures for transfer, the numbers of people to be transferred to each facility, and a population census for the facility.

16. *Rights, Equality, Always at Letchworth, Inc. v. Cuomo*, 84 Civ. 4163, S.D.N.Y. Judge Stewart. This case involves the care and treatment of the residents of Letchworth Village Developmental Center (LVDC). The case was settled, by stipulation, in November 1988. In the stipulation defendants agreed to maintain substantial compliance with Federal Medicaid regulations by complying with the regulatory requirement for "active treatment" and with at least forty of forty five additional standards concerning such areas as staffing, reports, use of restraints, grooming, behavior modification, medical and dental care, recreation and engineering and maintenance. The stipulation also set up procedures for resolving disputes under it, for conducting compliance surveys, for transferring residents to community facilities and a population census, with a staffing ratio for the facility.

17. *Salik v. Farrell*, 79 Civ. 0216, S.D.N.Y. Judge Griesa, effective April, 1983. A stipulation of dismissal established videotape monitoring system at Green Haven SHU. It provides for:

1. Video system to be operated 24 hours a day.
2. Tapes to be kept for 30 days or longer if requested by plaintiff's counsel.
3. Tapes may be reviewed by counsel upon request.
4. Complaints about excessive force to be referred to DOCS Inspector General.
5. That inmates are not to be taken into non-video monitored areas.

18. *Society for Good Will to Retarded Children v. Cuomo*, 78-CV-1847, S.D.N.Y., Judge Weinstein. This case involves the care and treatment of residents at Long Island Developmental Center. Upon a remand to the district court, the parties entered into a stipulation of settlement in September, 1990. Defendants agreed to maintain substantial compliance with Federal Medicaid regulations, similar to the provisions in *Rights Equality, Always at Letchworth, Inc.*, supra. The stipulation also set up procedures for transferring residents to smaller facilities.

19. *Todaro v. Ward*, 74 Civ. 4581, S.D.N.Y. Judge Ward. This case involves medical care at Bedford Hills Correctional Facility. See Appendix C.

20. *Webb v. Dalsheim*, 80 Civ. 7141 and *Farrad v. Walters*, 81 Civ. 2705 S.D.N.Y. Judge Sand. Consent order dated December 8, 1981. Wearing of beards for religious or medical reasons.

1. All inmates confined in a New York Department of Correctional Services (DOCS) facility who have submitted to one initial clean shave identification photograph upon reception by DOCS shall be allowed to grow and retain a beard not longer than one inch in length.

2. Defendants shall annul the disposition of all disciplinary proceedings held against named plaintiffs for refusal to

shave and shall expunge all entries of any such disciplinary proceedings.

3. Upon the request of any class members (past, present, and future members of the two classes) or plaintiffs' attorneys, defendants shall annul the dispositions of any and all disciplinary proceedings held against such class members on or after September 26, 1980.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

83 Civ. 4068 (LLS)

JANE DOE, ROGER BOE, by his next friend the Manhattan State Citizens Group, JOHN ROE, JILL NOE, by her next friend the Manhattan State Citizens Group, NANCY WOE, by her mother and legal guardian Wendy Woe, JACK SOE, by his next friend the Manhattan State Citizens Group, RALPH POE, by his sister and next friend Susan Poe, SALLY FOE, by her father and next friend George Foe, and MICHELLE COE, by her next friend the Manhattan State Citizens group, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

—against—

MARIO CUOMO, as Governor of New York State, STEVEN KATZ, as Acting Commissioner of the New York State Office of Mental Health; ARTHUR WEBB, as Commissioner of the New York State Office of Mental Retardation and Developmental Disability; MARLENE LOPEZ, as Director of the New York City Regional Office of Mental Health; and MICHAEL FORD, as Director of the Manhattan Psychiatric Center,

Defendants.

STIPULATION AND FINAL JUDGMENT

WHEREAS, Plaintiffs have commenced the captioned litigation in order to challenge the of care and treatment provided patients at the Manhattan Psychiatric Center; and

WHEREAS, Defendants have denied the allegations of the Amended Complaint and have defended against them; and

WHEREAS, Plaintiffs and Defendants, without conceding any infirmity in their claims or have agreed to settle the dispute between them with respect to the care and treatment of at the Manhattan Psychiatric Center and to take the steps outlined in this Stipulation and Judgment in order to promote and enhance high quality care and treatment at the Psychiatric Center for the benefit of the patients and their families as well as the and para-professional staff;

NOW, THEREFORE, before any testimony is adduced and without trial or adjudication of any issue of fact or law herein, it is hereby STIPULATED AND AGREED by and between the parties as follows:

1. GENERAL PROVISIONS

A. *Jurisdiction.*

1. The Court has jurisdiction over the subject matter of this action and over the parties hereto.

2. This Stipulation and Final Judgment shall terminate this action subject to the terms of paragraph 3 of this Section I(A) and paragraph 2 of Section I(B). The parties shall file a copy of this Stipulation and Final Judgment with Stipulation of Discontinuance in the action pending in New York Supreme Court entitled *Doe v. Cuomo*, Index No. 23311/86 (N.Y. County), which shall terminate that action, subject to the terms of paragraph 2 of Section I(B).

3. The Court shall retain continuing jurisdiction over the implementation of this Stipulation and Final Judgment and any disputes connected therewith.

4. In the event of any disputes regarding the implementation of this Stipulation and Final Judgment, the parties shall attempt good faith resolution before they may seek judicial intervention pursuant to paragraph 3 of this Section I(A).

B. Budget requests; Reserved Rights

1. Each year, defendants shall submit to the New York State Legislature a budget that contains sufficient funds to implement all aspects of this Stipulation and Final Judgment. Defendants shall provide plaintiffs' counsel with a copy of the Executive Budget when it is submitted to the Legislature in each year that this Stipulation and Final Judgment is in force.

2. With respect to budgets approved by the New York State Legislature, if the Legislature does not appropriate sufficient funds to implement any of Sections III(A)(1) (relating to psychiatrist staffing); III(B)(1) (relating to supervising psychiatrist staffing); IV(B)(3)(a) (relating to ward clerks); V(A)(1) (relating to nurse staffing) of this Stipulation and Final Judgment, plaintiffs reserve the right to reinstitute proceedings, in the status and as of the date of discontinuance of proceedings in connection with this Stipulation and Final Judgment, with respect to that portion of the Complaint which relates to those Sections as to which funds were not appropriated.

C. Compliance and Monitoring.

1. Defendants shall achieve substantial compliance with the terms and provisions of this and Final Judgment by the third anniversary of its execution by the Court. When the defendants have determined that they are in substantial compliance, they shall so notify counsel plaintiffs. Defendants' determination regarding such substantial compliance shall not be conclusive and may be contested by plaintiffs, who may, subject to the terms of paragraph I(A)(4) hereof, petition the Court to review whether defendants have substantially complied with the terms and provisions of this Stipulation and Final Judgment and to issue such orders as maybe necessary in connection with such review.

2. If defendants anticipate or experience an inability to comply with any term or provision of this Stipulation and Final Judgment, defendants shall report such inability to

counsel for plaintiffs, describing the nature of the problem, whether there are any alternative means of compliance and the defendants' plans for implementing such alternatives. Subject the terms of paragraph I(A)(4) of this Stipulation and Final Judgment, plaintiffs may petition the Court to review the matters reported to plaintiffs pursuant to this paragraph I(C)(20 and to issue such orders as may be necessary in connection with such review.

3. This Stipulation and Final Judgment will continue in force and effect for a period of two years after the date that defendants achieve substantial compliance with its terms and provisions.

4. In order to ensure proper implementation of this Stipulation and Final Judgment, in addition to the other reporting requirements specified in this Order, defendants shall supply counsel for plaintiffs with the following:

(a) *quarterly*, for a period of three years, (i) minutes of the Incident Review Committee, the Mortality Review Committee, the Governing Body, and the Executive Committee of the Medical Staff; (ii) overview of monthly statistics; (iii) any quality assurance special reports or studies; and (iv) any amendments to, additions to or deletions from the Manhattan Psychiatric Center's Policy and Procedures Manual; and

(b) *every six months*, for a period of three years, a report showing the status of defendants' compliance with Sections III(A)(1); III(B)(1); III(B)(3); V(a)(1); V(B)(4); VII(A)(1); VIII(A)(1); and IX(B)(2); of this Stipulation and Final Judgment.

5. After defendants have achieved substantial compliance with the terms and provisions of this Stipulation and Final Judgment, defendants shall continue to provide counsel for plaintiffs the materials specified in paragraph I(c)(4)(A), quarterly, for a period of two years.

6. During the time this Stipulation and Final Judgment is in effect, plaintiffs shall propose to the Governor the names of five persons who shall satisfy all conditions and fulfill all

requirements of membership for appointment to the Board of Visitors for the Manhattan Psychiatric Center. The Governor may appoint one of those persons so nominated to the Board of Visitors. In the event that the Governor does not make such an appointment, then three of plaintiffs' representatives and counsel shall have the right to tour the Manhattan Psychiatric Center at least twice each year during the year or years that the Governor does not appoint one of plaintiffs' nominees. Plaintiffs shall notify defendants' counsel seventy-two hours in advance of such a visit.

D. Scope and Coverage.

The terms and provisions of this Stipulation and Final Judgment shall apply only to the Manhattan Psychiatric Center. Nothing in this Stipulation and Final Judgment shall be construed as evidence of an agreement by defendants that the provisions of this Stipulation and Final Judgment set forth the minimum standard of care, under the United States Constitution or New York State law, for institutionalized mentally ill persons in the State of New York.

E. Policies Incorporated. Where this Stipulation and Final Judgment refers to policies of the Manhattan Psychiatric Center, those Policies are the current policies of Manhattan Psychiatric Center and are incorporated by reference. Defendants retain the discretion to amend such policies consistent with the terms of this Stipulation and Final Judgment. Plaintiffs and their counsel shall have access to such policies and any amendments thereto.

II. STANDARD OF CARE

The care and treatment of patients at the Manhattan Psychiatric Center shall be in accordance with (A) all provisions of this Stipulation and Final Judgment; (B) generally accepted professional judgments, practices and standards; (C) all applicable provisions of the New York State Mental Hygiene Law and the New York Code of Rules and Regula-

tions; and (D) all applicable Office of Mental Health and Manhattan Psychiatric Center policies and procedures.

III. *PSYCHIATRIC CARE AND PSYCHIATRISTS*

A. *Staffing.*

1. Within two years from the execution of this Stipulation and Final Judgment by the Court, defendants will provide one psychiatrist for every fifteen patients on the Evaluation and Brief Treatment Unit and the Secure Care unit and one psychiatrist for every thirty patients on all other units.

2. Psychiatrists at the Manhattan Psychiatric Center will be encouraged to attain Board certification. Manhattan Psychiatric Center will continue its current academic affiliations which are designed to provide post-graduate preparation for such certification.

B. *Supervising Psychiatrists.*

1. Within two years from the execution of this Stipulation and Final Judgment by the Court, defendants will provide the equivalent of one supervising psychiatrist per unit, to be assigned to units in the discretion of the Executive Director of the Manhattan Psychiatric Center or his designee in accordance with the terms of this Stipulation and Final Judgment.

2. Supervising psychiatrists shall be either Board certified or Board eligible with five years of clinical experience.

3. Manhattan Psychiatric Center shall establish standardized tasks for supervising psychiatrists which shall include, but not be limited to, (a) provisions for regular audits of the care provided patients falling into categories which the Executive Director believes warrant review; and (b) the review of dosages and blood levels of patient medication.

IV. MEDICAL CARE

A. *Staffing and Staff Responsibilities.*

1. Manhattan Psychiatric Center shall adhere to its policies concerning the number of physicians and medical specialists assigned to duty.

2. In order to ensure coordination of psychiatric care and general medical care, Manhattan Psychiatric Center shall establish and implement a policy requiring the clinical physician responsible for the physical health care of the patients assigned to a ward to make rounds of that ward on at least a weekly basis, to consult with the treating psychiatrist of any patient receiving treatment for a physical illness or disorder, and to make appropriate entries into the patient's clinical record.

B. *Policies and Procedures.*

1. Manhattan Psychiatric Center shall afford every patient a physical examination conducted by a physician within twenty-four hours of the patient's admission. Thereafter, patients shall be afforded subsequent physical examinations on an annual basis or as needed.

2. Manhattan Psychiatric Center will maintain a master log of patients under the care of a clinical physician. A designee of the Executive Director shall have responsibility to assure that care prescribed for such patients is delivered.

3. So that laboratory tests and procedures are administered and followed-up in a timely fashion, Manhattan Psychiatric Center will (a) hire a sufficient number of ward clerks to ensure that lab results are posted in patient charts; (b) mark those patient charts where laboratory tests have been ordered with a sticker or stickers marked "awaiting lab results;" and (c) create a "tickler system" under the supervision of a designee of the director to ensure that such results are obtained in a timely fashion from the department or organization making such tests.

4. Manhattan Psychiatric Center will conduct periodic audits of medical records to ensure that its policies regarding records are being implemented.

5. Manhattan Psychiatric Center will adhere to its policies concerning the provision, use and maintenance of emergency medical equipment.

6. Manhattan Psychiatric Center will implement Office of Mental Health policies governing the delivery of emergency medical services.

7. Manhattan Psychiatric Center will conduct regular consultations between its medical services staff and the staff of those hospitals to which its patients are referred for medical reasons. Such consultations will focus on (a) the quality of care given Manhattan Psychiatric Center patients at the receiving hospital; and (b) the adequacy of documentation of (i) the reasons for referral and (ii) the care rendered by the receiving hospital.

V. *NURSES AND NURSING CARE*

A. *Staffing.*

1. Within three years of execution of this Stipulation and Final Judgment by the Court, there shall be (a) one registered nurse on duty on each ward on the day and evening shifts; (b) one registered nurse for every two wards on the night shift;

2. Within ninety days of the execution of this Stipulation and Final Judgment by the Court, defendants shall prepare a plan detailing the efforts that will be made to obtain the complement of registered nurses required to achieve the level of nursing coverage provided for in paragraph V(A)(1). This plan shall include a timetable for achievement of such nursing coverage during each of the three years following execution of this Stipulation and Final Judgment. Defendants shall describe their progress in meeting this timetable as Part of the report required by paragraph I(C)(4)(b).

B. Direction and Supervision.

1. There shall be a Director of Nursing and two Assistant Directors of Nursing at Manhattan Psychiatric Center. For purposes of satisfying the staffing requirements of paragraph V(A)(1), these persons shall not be counted.

2. The Director of Nursing shall have the following minimum qualifications:

(a) a license and current registration to practice as a registered nurse in New York State *and* a Master's Degree in an administrative or health related field *and* four years of experience in a mental health setting. Two years of the qualifying experience must have been in a registered nursing position and two years in an administrative or management position; *or*

(b) a license and current registration to practice as a registered nurse in New York State *and* a Bachelor's Degree in Nursing *and* six years of experience in a mental health setting. Two years of the qualifying experience must have been in a registered nursing position and four years in an administrative or management position.

3. The Manhattan Psychiatric Center shall make all reasonable efforts to hire Assistant Directors of Nursing that have Master's Degrees in Nursing. At a minimum, the Assistant Directors of Nursing shall have a license and current registration to practice as a registered nurse in New York State and three years. experience in a mental health setting. Two years of the qualifying experience must have been in a registered nursing position and one year in an administrative or management position.

4. Manhattan Psychiatric Center shall establish a formal nursing supervisory process, and the role of nursing administrators shall be defined and clarified to enhance the supervision of nursing services. Manhattan Psychiatric Center shall also establish a quality assurance and appropriateness process for nursing services, which, at a minimum, shall require nursing administrators to (a) conduct periodic audits of the nurs-

ing care delivered in that part of the facility for which the administrator is responsible and (b) for the quality of that part of the clinical record documenting that care.

C. Policies and Procedures.

1. Professional Nursing Care at Manhattan Psychiatric Center shall be provided in accordance with standards enunciated from time to time by the Joint Commission on Accreditation of Hospitals ("JCAH"), including any changes in the JCAH standards made during the time period covered by this Stipulation and Final Judgment, and the nursing care standards established by Manhattan Psychiatric Center and the Office of Mental Health.

2. Manhattan Psychiatric Center shall adhere to its own Policies as well as Office of Mental Health policies regarding the use of restraint and seclusion.

3. Any member of the nursing staff who discovers a patient in cardiopulmonary arrest or respiratory arrest shall immediately institute appropriate cardiopulmonary resuscitation procedures and shall, as quickly as practicable under the circumstances, summon necessary medical and nursing assistance.

VI. MEDICATION

A. Dispensation.

1. Medication at Manhattan Psychiatric Center shall be administered either by registered nurses or licensed practical nurses.

2. Manhattan Psychiatric Center shall implement the Unit Dose System throughout the facility within one year of execution of this Stipulation and Final Judgment by the Court.

B. Policies and Procedures.

1. Manhattan Psychiatric Center shall establish and implement a policy requiring each ward to conduct medication

groups for patients in order to educate patients about medications and their effects.

2. The Manhattan Psychiatric Center shall adhere to Office of Mental Health policies on (a) monitoring of medication; (b) polypharmacy; and (c) screening for tardive dyskinesia.

VII. PROGRAMS AND ACTIVITIES

A. Programming.

1. Subject to paragraphs 2 to 4 of this Section VII(A), Manhattan Psychiatric Center shall adopt a goal of providing each patient with a minimum of twenty hours' programming per week. Programming shall be available (a) seven days per week; (b) on day and evening shifts; and (c) on-ward, off-ward and at the Rehabilitation Center. In calculating the number of programmed hours per patient per week, Manhattan Psychiatric Center shall not include time spent watching television unless watching television is in fact a supervised activity in which, for example, staff discuss the televised programs with patients before, during or after viewing.

2. All patients shall have the programming opportunities described in paragraph 1 of this Section VII(A), *provided however*, that (a) patients in the infirmary shall be exempted from the requirements of paragraph 1 of this Section VII(A); (b) patients on the Evaluation and Brief Treatment and Secure Care units will participate according to need and individual ability, but may be exempted from the requirements of paragraph 1 of this Section VII(A) because of the acute nature of their conditions; and (c) patients on any unit may be exempt from participation based on an assessment of individual condition and need. The reasons for the exemption will be detailed in the Patient's chart, and the continuing need for the exemption shall be reviewed by the patient's treatment team at least on a weekly basis.

3. Inability to participate in programmed activities based on clinical reasons shall be documented in the chart by the ward psychiatrist or treatment team leader.

4. A patient's refusal to participate in programming shall be handled in accord with applicable New York law. Nothing shall prohibit Manhattan Psychiatric Center staff from encouraging voluntary patient participation in programming.

B. Policies and Procedures.

1. The Director shall designate individuals at the unit or ward level to assume primary responsibility for ensuring that scheduled programming occurs. They shall also be responsible for encouraging, and motivating staff to encourage, patient participation in programmed activities. Performance evaluations of such designees as well as other staff as deemed appropriate by the Director and his designees shall include assessments of the discharge of the responsibilities outlined in this Section.

2. Manhattan Psychiatric Center shall establish, and, when established, shall adhere to, standards for clinical programs which shall address, among other things, (a) assessment; (b) affective, cognitive, and physical functioning; (c) audits of scheduled programming; (d) the referral, discharge criteria, goals and methodology for groups; and (e) the process for ensuring staff coverage of scheduled activities.

3. As the off-ward program space described in paragraph IX(B)(3) is developed, Manhattan Psychiatric Center will establish policies, procedures and schedules for the use of such space by patients on a regular basis.

4. Every patient shall receive or, if appropriate, have maintained by staff, a program card, which shall name the program activities in which the patient should participate, as well as the location, day, and time of each program. Manhattan Psychiatric Center shall establish and implement a policy which shall identify the Procedure for use of the program card to maximize (a) patient participation in Programmed activities and (b) coordination and consultation between and among interdisciplinary staff on-ward, off-ward and in the Rehabilitation Center relating to patient Programming.

VIII. *MENTALLY RETARDED PATIENTS*

A. New Admissions; Treatment and Transfer.

1. From the date of this Stipulation and Final Judgment, Manhattan Psychiatric Center will adopt a goal of not admitting individuals with a primary or secondary diagnosis of mental retardation. In the event that an individual admitted to Manhattan Psychiatric Center after the date of this Stipulation and Final Judgment is diagnosed as being mentally retarded, he or she will be evaluated by the Office of Mental Retardation and Developmental Disability ("OMRDD") within forty-five days of the diagnosis, or upon stabilization of the psychiatric condition precipitating the admission. If an individual is determined to have an IQ below 50 or comparable handicap in another developmental disability, or if the person has an IQ between 50 and 69 or a comparable handicap in another developmental disability, and the patient's primary need is a developmental service rather than inpatient psychiatric care, the patient shall be transferred to a program operated or licensed by the Office of Mental Retardation and Developmental Disabilities within a reasonable period of time.

2. Manhattan Psychiatric Center may admit individuals from OMRDD for the purpose of stabilizing their psychiatric condition. When the psychiatric condition precipitating the admission is stabilized, Manhattan Psychiatric Center shall notify OMRDD. Within ten days of such notification, the patient shall be returned to the custody of OMRDD.

3. To the extent any eligible individuals admitted after the date of this Stipulation and Final Judgment are not transferred to an OMRDD unit within a reasonable period of time, Manhattan Psychiatric Center shall specifically address the treatment needs of those patients. Manhattan Psychiatric Center shall consider in consultation with experts in the treatment of mental retardation and developmental disabilities the creation of a separate unit for such patients and transfer those deemed appropriate for such unit to the unit. If Manhattan Psychiatric Center decides not to create a separate unit

for such patients, it will report this decision and the reason for it to the plaintiffs. Whether or not a special unit is established pursuant to this paragraph, Manhattan Psychiatric Center shall develop and implement specific treatment plans for all patients admitted after the date of this Stipulation and Final Judgment having a primary or secondary diagnosis of mental retardation, in consultation with outside experts in the treatment of mental retardation and developmental disabilities, taking into account the specialized needs of such patients.

4. The Office of Mental Health and OMRDD agree to act in accordance with the OMRDD/OMH Plan For Service to the Multiply Disabled (the "Plan") with respect to patients admitted after the date of this Stipulation and Final Judgment having a primary or secondary diagnosis of mental retardation. Defendants retain the discretion to amend the Plan consistent with the terms of this Stipulation and Final Judgment. Plaintiffs shall have access to any such amended Plan.

B. Existing Patients; Treatment and Transfer.

1. Manhattan Psychiatric Center shall, within sixty days of execution of the Stipulation and Final Judgment by the Court, identify all patients currently at the Manhattan Psychiatric Center having a primary or secondary diagnosis of mental retardation or developmental disability.

2. Within forty-five days of identification of such patients, OMRDD shall assess such patients to determine which fit the criteria for treatment in an OMRDD facility.

3. Those individuals fitting the eligibility criteria established by OMRDD shall, within sixty days be transferred to a unit operated by OMRDD to provide appropriate rehabilitative services for this population. OMRDD shall give such patients priority status for placement in OMRDD units over patients from other facilities.

4. In the event that patients identified pursuant to paragraph 1 of this Section VIII(B) are not transferred to an OMRDD unit within sixty days, then such patients shall be treated in accordance with the requirements of paragraph VIII(A)(2).

5. The Office of Mental Health and OMRDD agree to act in accordance with the Plan with respect to existing patients as of the date of this Stipulation and Final Judgment having a primary or secondary diagnosis of mental retardation. Defendants retain the discretion to amend the Plan consistent with the terms of this Stipulation and Final Judgment. Plaintiffs shall have access to any such amended Plan.

IX. PHYSICAL PLANT

A. *Current Capital Plans; Other.*

1. The Office of Mental Health has completed capital renovations necessary to assure compliance with national fire safety standards such as to satisfy Department of Health and Human Services Medicare and Medicaid certification requirements.

2. On a periodic basis, but no less than twice each year, the Office of Mental Health shall arrange for an inspection of Manhattan Psychiatric Center by qualified inspectors to ensure continued compliance with life safety codes and applicable sanitation codes.

3. Manhattan Psychiatric Center will complete implementation of the tray line system of food preparation within one year of entry of this Stipulation and Final Judgment, and will thereby ensure compliance with applicable codes and regulations for food preparation, transportation, and storage.

B. *Planned Capital Expenditures.*

1. The Office of Mental Health plans additional capital renovations at Manhattan Psychiatric Center. These renovations or "space conditioning" shall (a) address any fire safety issues which have not been addressed by the capital renova-

tions described in paragraph XI(A)(1); (b) provide for removal of asbestos; (c) provide for installation of air conditioning; (d) provide for improvements to (i) electrical systems; (ii) plumbing systems; and (iii) elevators; and (e) enhance the living environment on all wards. This project is now being designed. Funds for construction will be requested in the FY 1988-89 Executive Budget. If an appropriation is made, construction is anticipated to begin in June 1988. In anticipation of the space conditioning project, 220 patients will be transferred from Manhattan Psychiatric Center to JCAH accredited/HHS certified facilities, beginning in October 1987. These transfers will occur according to state law and regulation. Every effort will be taken to assure that the transfers are voluntary.

2. Although it is intended that approximately 100 of the 220 patients who are transferred during space conditioning will be transferred back to the Manhattan Psychiatric Center after work is completed, and some other transferred patients may later be re-admitted to the Manhattan Psychiatric Center during the normal course, having been discharged from other facilities, defendants agree that, aside from these contemplated re-admissions, there will not be a mass transfer back to the Manhattan Psychiatric Center of patients who had been transferred out during space conditioning. It is intended that as a result of space conditioning there will be a permanent reduction of 120 patients from the Patient census as of the date this Stipulation and Final Judgment is executed by the Court. Whether or not this reduction in census occurs, Manhattan Psychiatric Center shall adhere to the staffing guidelines established elsewhere in this Stipulation and Final Judgment.

3. The Office of Mental Health intends as part of Manhattan Psychiatric Center's space conditioning project to convert three additional wards, now used as residential space for patients, to space for off-ward Programming. Upon completion of the project, a total of four wards in the Meyer and Dunlap buildings will be available for this purpose, in addi-

tion to the Rehabilitation Center. During the project, three wards will be available for this purpose.

X. EDUCATION AND TRAINING

A. Nurses and Nursing Staff.

1. Within 180 days of execution of this Stipulation and Final Judgment by the Court, Manhattan Psychiatric Center shall recruit and hire an appropriately qualified nurse to oversee and direct nursing education.

2. Within one year of execution of this Stipulation and Final Judgment, all direct care staff working on the wards of Manhattan Psychiatric Center shall be trained in basic cardiopulmonary resuscitation in accordance with the American Heart Association Program. Thereafter, on an ongoing basis, at least 50% of the direct care staff working on each ward on each shift shall be currently certified in basic cardiopulmonary resuscitation, and Manhattan Psychiatric Center shall make all reasonable efforts to ensure that all direct care staff working on each ward on each shift shall be currently certified in basic cardiopulmonary resuscitation.

3. Nursing staff shall be trained in the use and maintenance of emergency medical equipment in accordance with Manhattan Psychiatric Center policies. All nursing staff shall be responsible for knowing the location of emergency medical equipment.

4. Manhattan Psychiatric Center shall provide training on a Periodic basis to all nursing staff on medication administration and monitoring.

5. Within 30 days of the execution of this Stipulation and Final Judgment, all direct care staff working in Manhattan Psychiatric Center's infirmary shall be trained in cardiopulmonary resuscitation in accordance with the American Heart Association program. Thereafter, on an ongoing basis, at least 85% of the staff working in the infirmary shall be certified on a current basis and at a minimum there shall be at least 2 staff members on every shift working in the infirmary

who are certified in cardiopulmonary resuscitation on a current basis.

B. Other Training and Education.

Manhattan Psychiatric Center shall make all reasonable efforts to assure that all direct care staff are trained with regard to fire safety issues and the identification and management of the violent patient.

Dated: New York, New York
July ____, 1987

For the Plaintiffs:

SHEARMAN & STERLING

Robert F. Dobbin

For the Defendants:

New York State Department
of Law

Robert Abrams
Attorney General
State of New York
by Arnold D. Fleischer

MENTAL HEALTH LEGAL SERVICE

Robert F. Gottlieb

SO ORDERED:

Louis L. Stanton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4581 (RJW)

LOUISE TODARO, *et. al.*,

Plaintiffs,

—against—

THOMAS A. COUGHLIN, III, *et. al.*,

Defendants.

MEMORANDUM OF UNDERSTANDING

The parties having executed a stipulation agreeing to modify the Court's Judgment and resolving plaintiffs' September 14, 1988 motion for contempt and modification of the Judgment, it is hereby understood that the following shall apply to this stipulated modified Judgment:

1) Section III of the stipulated modified Judgment requires the establishment and maintenance of a system to implement and track physician orders. The parties agree that the terms of this Section shall be subject to re-negotiation based upon the final report on the medical records system at Bedford Hills being prepared by the monitor's assistant, Antonio Martin, and that recommendations contained in this report, which are not inconsistent with the goals of this Section, may be incorporated therein.

2) Sub-section II(B) requires the establishment and maintenance of a system to provide care to plaintiffs between screening sessions. Paragraph II(B)(6)(b) requires that logs of all inmate requests for such care be kept for a period of six months following the date of entry of this Judgment. It is

understood by the parties that following completion of this six month period, the Court's monitor and plaintiffs' counsel may review these logs. If after this review the monitor or plaintiffs' counsel believe that the system is failing to provide face to face medical evaluations of plaintiffs by medical staff, when appropriate, including when plaintiffs complain of pain or discomfort, the parties will re-negotiate this section to ensure the proper delivery of medical care to plaintiffs between screening sessions.

3) Section V(D) of the Judgment requires that defendants employ a nurse administrator, 14 fulltime registered nurses and two fulltime licensed practical nurses. In the event that defendants are unable to meet the requirement that they employ 14 fulltime registered nurses, after having made bona fide attempts to do so, they may seek permission to employ licensed practical nurses in lieu of registered nurses, from the monitor or the Court. Such permission shall be given only upon a showing that the employment of licensed practical nurses instead of registered nurses will not have a deleterious impact upon the provision of health care to plaintiffs. In no event shall defendants employ less than twelve registered nurses.

DATED: NEW YORK, NEW YORK
June 23, 1989.

PHILIP L. WEINSTEIN
DORI A. LEWIS
MICHAEL WISEMAN
The Legal Aid Society
Prisoners' Rights Project
15 Park Row-7th floor
New York, New York 10038
(212) 577-3530

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Defendants
120 Broadway
New York, New York

BY:

BARBARA B. BUTLER
DARREN O'CONNOR
Assistant Attorneys General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
74 Civ. 4581 (RJW)

LOUISE TODARO, *et. al.*, and
all other persons similarly situated, *Plaintiffs,*
—against—
THOMAS A. COUGHLIN, III, *et. al.*,
Defendants.

STIPULATION AND ORDER
MODIFYING JUDGMENT

WHEREAS, on September 14, 1988 Plaintiffs moved to hold Defendants in contempt of the Judgment entered in this case, and for modification of said Judgment to achieve its purposes; and the parties having agreed to resolve this matter without further litigation, subject to the approval of the Court:

IT IS HEREBY STIPULATED that Plaintiffs' motion is withdrawn without prejudice; and

IT IS FURTHER STIPULATED that the Judgment in this case is modified, so as to ensure that defendants provide competent and adequate medical care to plaintiffs, consistent with contemporary medical standards, and the entire revised Judgment is as follows:

I. IN PATIENT COMPONENT (IPC)

A) IPC shall not be used for boarding any types of persons other than medically sick patients, except that psychiatric patients may be temporarily boarded in the event the

mental hygiene satellite clinic is full. The provisions of this Judgment do not govern psychiatric care and treatment.

B) No inmate shall be locked into her room while confined on IPC unless a health staff member (physician or nurse) has determined that such locking will not jeopardize the inmate's health or interfere with the delivery of prescribed care and:

1) the locking is at the request of the inmate who expresses concern for her personal safety; or

2) a health staff member determines that the inmate presents a danger to others; or

3) an inmate has been admitted to IPC from disciplinary segregation and the Deputy Superintendent for Security determines that the locking is necessary for security reasons.

In any case where an inmate's door is locked a health staff member shall personally observe the inmate every half hour. An entry including the name of the inmate and the basis for the decision to lock will be made in the IPC log referred to in subsection I(H).

C) The solid door in the IPC corridor shall be used only as is necessary for fire safety and a grated door permitting visual observation of the entire corridor shall be employed at the end of the corridor.

D) A nurse's station shall be established and maintained within or immediately adjacent to IPC and shall contain all necessary emergency equipment, medication and supplies which shall be immediately accessible to all health staff members.

E) Defendants shall have a nurse stationed on IPC to observe and assist inmates, 24 hours a day, seven days a week. While on duty, this nurse shall not leave IPC for any significant period and shall have no duties which require leaving IPC for more than a few minutes or otherwise impair his or her ability to observe and assist IPC inmates. This nurse shall make rounds and personally observe each inmate in IPC at least once every two hours and more often when required

by a patient's medical condition, and such rounds will be recorded in the log book as required by paragraph I(H). Defendants shall ensure, to the extent possible, the continuity of the nursing staff in IPC so that staff remains familiar with the unit and can provide continuity of care. At least one registered nurse shall be present in the Health Services Building at all times, unless said nurse is providing emergency medical services in another part of the facility.

F) Defendants shall maintain at all times a functioning signal system for use in emergency situations which shall operate as follows:

- 1) The system must be operable by each inmate in IPC directly from her bed.

- 2) The signal shall be visible and audible to the nurse assigned to IPC.

- 3) The signal must be responded to by the nurse or other IPC health staff member expeditiously, and as soon as possible after the patient's call. Special attention shall be given to signals from inmates whose conditions are serious. If all IPC health care personnel are actively engaged in a medical emergency when a signal is sent, then the signal may be answered by a correction officer who shall then promptly communicate with health staff.

G) Physician rounds:

- 1) shall be conducted five days a week, irrespective of holidays. There shall be no more than two consecutive days without rounds being held. On any day preceding a day in which rounds are not to be conducted, the facility Medical Director, or a physician designated by the director, must examine each IPC patient and review her chart, and based upon this examination and review, certify whether each patient must be seen by a physician on the following day or days in which rounds will not be conducted. In making this determination, the certifying physician will use her best medical judgment, giving special attention to persons with AIDS related illness. An

entry regarding this review and certification shall be made in each patient's chart; and

2) shall be conducted by the facility Medical Director or a physician designated by the director, who shall have appropriate training and expertise to care competently for all patients confined in IPC. These rounds shall be conducted in conformity with accepted medical standards, and in accordance with a protocol which shall be created, maintained and followed by medical staff. At a minimum this protocol shall require that rounds consist of a face to face encounter between the physician and patient, appropriate physical examinations, and the review of each patient's chart, with appropriate entries being made.

(H) A log book will be kept, separate from the patients' charts, reflecting all rounds of IPC conducted by medical personnel, which at a minimum shall include the date and time of each round, and the signature of the person making the round.

(I) Defendants shall have sufficient space available in IPC so that infirmary care will be available to all inmates requiring such care. IPC will be maintained in a sanitary, well ventilated and healthful manner. All necessary measures will be taken on a regular basis to keep the IPC free of insects, vermin and rodents.

(J) All medical staff assigned to IPC shall be authorized by defendants to call directly for an ambulance or other immediate transportation to a hospital when such transportation is deemed necessary.

(K) Upon the termination of sub-sections I(A)-(G), (I) & (J) in accordance with sub-section XI(D), the following provisions shall apply: IPC shall be used for medically sick inmates, shall have sufficient space so that infirmary care is available to all inmates requiring it, shall be maintained in a healthful manner, and shall have a nurse's station within it or immediately adjacent to it which will be connected to a functioning room signal system for patient use in emergencies.

Physician rounds of the IPC shall be conducted five days per week, and more often when medically indicated. There shall be a nurse assigned to the IPC 24 hours a day, seven days a week, who shall conduct regular rounds, and who shall have no duties outside of IPC which require leaving IPC for any significant period or otherwise impair his or her ability to observe and assist IPC inmates. Physician and nurse rounds shall be conducted in accordance with medically accepted standards and all medical staff assigned to IPC shall have the authority to summon immediate transportation to move a patient to a hospital.

II. SICK CALL AND PHYSICIAN REFERRAL PROCEDURE

A) In the absence of a functioning evaluative screening procedure as defined in sub-section II(B), below, all inmates who request to be seen by a physician must be seen by a licensed physician by the next day.

B) In the absence of automatic access to a physician as provided for in sub-section II(A) above, inmates who seek medical attention must be medically evaluated and screened and physician appointments scheduled according to the urgency of need, consistent with the following procedures:

1) Medical evaluation and screening (hereinafter screening) shall be performed at a place separate from the administration of medication. In the event any-part of screening is conducted at the same time as any part of medication administration, defendants shall ensure that inmates have access to both services on any given day.

2) Screening shall be conducted by licensed medical personnel, with training at least equivalent to that of a registered nurse, who have received special training in the techniques of physical assessment, and in the recognition, diagnosis and treatment of infectious diseases consistent with Section VIII, below.

3) Any person conducting screening must be certified by the facility's Medical Director as having received this requisite training in physical assessment and infectious diseases. In the event no person so certified is available to conduct screening, there shall be direct access to a physician within 24 hours of an inmate's request, as set forth in sub-section II(A). above. A licensed physician shall either be present in the facility or on call, during screening, to provide needed assistance.

4) Specific written protocols, defining the evaluation procedures to be followed at screening and the treatment which the screening staff member may provide, shall be established by the facility's Medical Director, shall be available to the screening staff member, and shall be followed by medical staff. Such protocols shall include, but not be limited to the recognition and treatment of chronic and complex conditions such as HIV related illness, shall govern the scheduling of physician appointments according to the urgency of need, and shall be consistent with contemporary standards of care and all aspects of this Court's Order and Judgment.

5) Defendants shall conduct screening five days a week, irrespective of holidays. There shall be no more than two consecutive days without screening being held. Screening shall be readily available to all members of the plaintiff class and shall be conducted at the first screening session following the inmate's request. An inmate shall request screening by placing her name on a screening sign-up list which shall be available to all inmates in their housing areas.

6) Defendants shall create, maintain and follow a protocol governing the provision of medical care between screening sessions to inmates. At a minimum this protocol will include the following:

a) When an inmate requests care between screening sessions, a corrections officer will telephone a member of the health staff and shall provide the details of the inmate's condition. The health staff member shall conduct a medically pertinent inquiry into the inmate's condition, and determine

whether the inmate should be seen by a member of the health staff prior to the next screening session. Whenever an inmate complains of pain or discomfort the health staff member must conduct a face to face evaluation of the inmate and provide appropriate care.

b) Defendants shall maintain a log of all inmate requests as set forth in sub-paragraph II(B)(6)(a) which shall contain the inmate's name, the nature of the complaint and whether the inmate was seen by a member of the health staff. Defendants shall maintain these logs for six months following the date of entry of this Judgment.

7) Screening shall be conducted in a manner and location permitting both confidential communication between the inmate and the screening medical staff member, and private physical examinations relevant to the physical complaints presented by the inmate.

8) The screening staff member shall have immediately available for use during screening a thermometer, a sphygmomanometer, a tongue depressor, an otoscope, a stethoscope, materials for taking cultures, a scale, a sufficient supply of all medications required by the protocols established in accordance with paragraph II(B)(4), and any additional equipment and supplies which the defendants deem necessary to conduct screening.

9) The medical record of the inmate being screened shall be maintained in a confidential manner, and shall be available to the health care provider at the time of screening. At the time of screening, the screening staff member shall make an entry in the inmate's individual medical record, which shall include a description of the inmate's health complaint and condition, an indication of the staff member's recommendations, and whether a doctor's appointment should be scheduled. A brief statement of this information shall be placed on either a separate screening roster or on the screening sign up list.

10) When a physician appointment is to be scheduled for an inmate, the screening staff member shall enter a written notation of the need for the appointment either on the screening sign up list or the screening roster. The list or roster shall be transmitted to the staff member responsible for scheduling physician appointments, who will place the inmate's name on the appropriate physician's appointment list. Excluding ophthalmology, podiatry and dermatology, physician appointments shall be scheduled for within 14 calendar days of the screening date, except where an inmate's condition requires a physician's appointment sooner, in which case the screening staff member shall indicate this need on the screening list or roster, and the staff member responsible for scheduling physician appointments shall schedule the appointment according to the stated recommendation.

a) Regardless of the recommendation of the screening staff member, if an inmate requests a physician appointment, one shall be scheduled no more than 14 calendar days from the request;

b) Unless the appointment is to be scheduled for the same or next day, the staff member preparing the physician appointment list shall inform the inmate of the date and time of the appointment by providing the inmate with a written appointment slip, signed by this staff member and setting forth the inmate's name, and the date and time of the doctor's appointment. The signed appointment slip shall be provided to the inmate in sufficient time to provide adequate notice of and preparation for the appointment.

11) Any inmate who is known to be HIV+ or has a history consistent with HIV positivity and who presents at screening with possible symptoms of an opportunistic AIDS infection, as set forth in the AIDS protocol referred to in Section VIII, shall be examined by a licensed physician who shall have expertise in the treatment of AIDS related illness as set forth in sub-section V(A), that day, and when appropriate by the infectious disease specialist the next time this specialist is in the facility. In the event the inmate's condition

constitutes an emergency she must be seen within one hour by a facility physician and she must be examined by the infectious disease specialist the next time this specialist is in the facility, or be immediately transported to an outside hospital.

C) Upon the termination of sub-sections II(A) and (B) in accordance with sub-section XI(D), the following provisions shall apply: Medical evaluation (screening) shall be conducted in a professionally sound, orderly and confidential manner in accordance with protocols. It shall be conducted at least five days per week by capable medical staff appropriately trained in physical assessment and recognition and diagnosis of infectious diseases. Inmates who seek medical attention must be medically evaluated at the next screening session following their request and there shall be a system for the provision of emergency medical care between screening sessions. Screening staff must make appropriate notations regarding the screening encounter in the inmate's medical record. Physician appointments shall be scheduled within 28 calendar days of the inmate's request for medical attention, or in a shorter time if medically required. Inmates will be provided with adequate notice of physician appointments.

III. IMPLEMENTATION AND TRACKING OF PHYSICIAN ORDERS

A) Defendants shall institute, maintain and follow a system to coordinate the implementation and tracking of all physician orders so that care shall be provided within the time ordered, if any, and in any event in a timely fashion. Such orders include outside consultations, specialty care, inpatient stays, x-rays, and diagnostic and laboratory tests and procedures, regardless of whether these orders are to be filled inside or outside the facility. This system shall be reflected in written procedural guidelines, a copy of which shall be provided to the monitor and counsel for plaintiffs. This system shall not be changed without affording the monitor and plaintiffs' counsel notice of the proposed change and

an opportunity to discuss it with defendants. Orders for medication are not to be tracked under this system.

B) At a minimum this system shall include the following:

1) When appropriate, the physician making an order will designate a date, consistent with accepted medical standards, by which the ordered care must be completed and should enter such date in the inmate's chart. This date will be known as the "outside date".

2) Excluding orders for laboratory tests, all physician orders for the entire Bedford Hills medical staff will also be entered in one central file, record, or log (the "Ordered Care File"). The entries in the Ordered Care File shall contain the inmate's name, the ordering physician's name, the date of the order, the date and nature of the scheduled appointment or other service, a brief description of the patient's condition, the outside date (if any), and an indication whether the appointment or service was completed, or the reason why the appointment or service was not successfully completed.

3) Orders for laboratory tests shall be maintained in a separate Laboratory Order Book which shall contain the same categories of information as the Ordered Care File.

4) Inmates are to be timely advised of any necessary preparation for any test, examination or procedure to be conducted inside or outside the facility and the appropriate medical records shall accompany each inmate on outside medical trips.

5) All facility physicians, whether full or part time, will check the Ordered Care File and Laboratory Order Book at least once per week to determine if their orders have been carried out. If physicians are in the facility less than one time per week, they must check the Ordered Care File and Laboratory Order Book each time they are in the facility.

6) The facility's Medical Director or physician designee will monitor the Ordered Care File and Laboratory Order Book on a regular basis to ensure that orders have been com-

pleted by the ordered date, or if no ordered date was assigned, within sixty days of the order. In the event that an order has not been completed by the outside date, or within 60 days from the order if no outside date is indicated, it shall be the responsibility of this physician to notify the ordering physician, who shall take steps, as appropriate to ensure the provision of care, renew the order and if appropriate set a new outside date so as to assure continued monitoring as provided in this Section. Any such renewed order is subject to all of the provisions of this Section.

7) With the exception set forth in paragraph III(B)(7)(a), the facility's Medical Director or physician designee must review all medical paper work which accompanies an inmate back from an outside medical trip, and all results of lab tests or other records of ordered care on the date they arrive in the facility. If the Medical Director determines that review by the physician who ordered the care is necessary before the next scheduled appointment with this physician, then this physician must review and initial these papers on his or her next day in the facility. If indicated by the results, either of these physicians shall take immediate action if necessary.

a) The facility's Medical Director may designate a registered nurse to review all normal laboratory results which are provided to the facility in the form of a computer printout.

8) Inmates will receive written notice of results of laboratory or diagnostic tests which are of no clinical significance within fourteen (14) calendar days of the receipt in the facility of the results of such test.

9) In the case of non-emergent abnormal laboratory or diagnostic tests results of clinical significance, the inmate will be seen by the ordering physician, or if that physician is unavailable, by the Medical Director, within 14 calendar days of the receipt in the facility of the results of such test. At such time the physician will explain the result to the patient and order such follow up care as is appropriate. In the case of emergent abnormal results, either of these physicians shall take immediate and appropriate action.

C) Nothing contained in this Judgment shall prevent Bedford Hills Correctional Facility from participating in a Department wide computerization of medical records, even if such participation requires departures from some of the record keeping requirements of this Section; provided that such participation shall not diminish the facility's capacity to track physician orders, to deliver ordered care on a timely basis or to deliver a competent level of medical care.

D) Upon the termination of sub-sections III(A), (B) & (C) in accordance with sub-section XI(D), the following provisions shall apply: Defendants shall institute and maintain a system to coordinate the implementation and tracking of all physician orders so that care shall be provided in a timely and complete fashion. Such orders include outside consultations, specialty care, inpatient hospitalizations, x-rays, and diagnostic tests and procedures, regardless of whether these orders are to be filled inside or outside the facility. Physicians making such orders (excluding medication orders) will, when appropriate, assign an outside date by which such order must be reviewed, and if no such outside date is assigned to an order, it must be reviewed within sixty (60) days. If care is not delivered within the time ordered, or within 60 days if applicable, physicians must renew the order if appropriate, and take steps, as appropriate to ensure the provision of care. Inmates must be advised in a timely manner of necessary preparations prior to the delivery of care. All pertinent medical records will accompany inmates on outside medical trips. Inmates shall be notified within a medically appropriate time of the results of all laboratory work and diagnostic tests, and such results shall be reviewed by medical staff as soon as available and follow-up care shall be provided within a professionally appropriate time as dictated by the tests results.

IV. CHRONICALLY ILL INMATES

A) Defendants will ensure the regular monitoring by health care personnel of all chronically ill inmates including, but not limited to, persons suffering from:

- 1) AIDS
- 2) hypertension
- 3) heart disease
- 4) diabetes
- 5) cancer
- 6) asthma
- 7) tuberculosis
- 8) lupus
- 9) seizure disorders
- 10) kidney disease
- 11) Hodgkin's disease.

B) This monitoring shall include pertinent observations and appropriate testing and adjustments of medication.

C) A recall file shall be maintained of all chronically ill inmates which shall include the inmate's name, condition(s) the type(s) of monitoring required, the period(s) within which the inmate must be recalled, and the dates the monitoring is actually performed.

D) Defendants shall formulate protocols for chronic illnesses which shall be available at screening and in IPC.

V. STAFFING

A) Defendants shall employ at least one fulltime physician who is not a gynecologist, podiatrist or ophthalmologist who shall work on-site at Bedford Hills at least 34 hours per week. This physician must possess experience in the treatment of persons with HIV related illness. Defendants shall employ additional primary care physicians, excluding specialists, who shall work on site at Bedford Hills an additional minimum of 48 hours per week, and will employ a gynecologist on site at Bedford Hills a minimum of 12 hours per week. For purposes of this subsection the phrase "work on site at Bedford

Hills" may include work performed off site if such work is directly related to the provision of medical care to the facility, but does not include hours when the physician is off site and on call to the facility.

B) A fulltime physician working at least 34 hours a week on site at Bedford Hills, as defined in sub-section V(A), will be designated as the facility Medical Director, and as such will be responsible for the overall coordination and delivery of health care at the facility. The specific duties of the Medical Director will consist of responsibility for at least the following:

- 1) Administration of IPC, including conducting daily rounds or designating a capable and trained substitute physician to conduct rounds; ensuring the overall quality of screening; keeping informed of the nature of inmate complaints pertaining to medical care; and overseeing a system of peer review.

- 2) Certification of medical staff to conduct screening and continuing supervision of the screening process.

- 3) The review of all inmate deaths.

- 4) The supervision and review of the Ordered Care File and Laboratory Order Book.

- 5) The review of all medical paper work from outside medical trips, inpatient stays, or laboratory or diagnostic tests.

- 6) All other duties imposed by this Judgment on the Medical Director.

C) In addition to the physician staffing requirements set forth in sub-section V(A) & (B), and except as provided below, defendants shall employ a physician, board certified in infectious disease, at Bedford Hills:

- 1) This physician will work on site at Bedford Hills a minimum of 4 hours per week, and more if necessary to adequately meet the medical needs of plaintiffs. For purposes of

this paragraph the phrase "work on site" shall have the same meaning as set forth in sub-section V(A).

2) In the event defendants are unable to obtain the services of a physician board certified in infectious disease, after making a bona fide effort to do so, a physician suitably trained and experienced in the diagnosis and treatment of HIV related illness shall be employed. In this event the monitor must approve the adequacy and suitability of his/her training and experience. In the event that this contingency arises at a time when the monitor is no longer assisting the Court with this litigation, defendants will notify counsel for plaintiffs of the qualifications of this physician.

3) As an alternative to the infectious disease physician, defendants may secure the services of an outside medical facility to conduct an infectious disease clinic at Bedford Hills, provided that such clinic affords infectious disease care at least equivalent, in time and quality, to that offered by the physician.

4) This physician, or a physician associated with the alternative infectious disease clinic, shall be on call for consultation at all times.

5) The infectious disease physician or alternative clinic must keep a separate appointment book.

D) Defendants shall employ at Bedford Hills a minimum of one nurse administrator, 14 fulltime registered nurses and at least two fulltime licensed practical nurses. Defendants may utilize part-time nurses to fulfill this requirement. Defendants shall maintain at least two per diem nurse lines, to be used in the event that less than all of these fulltime positions are filled. If the two per diem nurse lines are not adequate to meet staffing vacancies, defendants may then utilize agency nurses to meet their staff obligations under this sub-section.

E) Defendants shall use their best efforts to avoid the use of agency or per diem nursing services and shall resort to these services only when bona fide attempts to fill vacant nursing positions have failed. In the event that agency or per

diem nurses are utilized, defendants will ensure that they are properly trained and certified as set forth in paragraph 11(B)(3), and will attempt to ensure the continuity of nurses assigned to the facility.

VI. MEDICAL RECORDS

A) Defendants shall maintain such medical records as are necessary for the competent and professional delivery of health care to the plaintiff class.

B) Defendants will:

1) use one medical record for each patient which will be arranged topically and chronologically, which will document each encounter with a health care provider, and which will utilize a problem list and problem oriented assessment.

2) discontinue the use of a separate medical record for patients admitted to IPC.

3) discontinue the use of the present Ambulatory Health Record (AHR), form number 3105).

4) discontinue the use of an active/inactive patient file; however, in the event a medical chart becomes so voluminous as to be unwieldy, additional volumes may be used. Nothing in this provision shall require defendants to reintegrate files which were separated prior to the entry of this Judgment.

5) require that all health care personnel write legibly.

C) Defendants shall employ a medical records supervisor who is specifically trained in the maintenance of medical records.

1) This supervisor and the medical records system shall be evaluated by an outside medical records consultant every two years, and this consultant will conduct inservice training as needed.

VII. RECORD KEEPING PROCEDURES AND MECHANISMS FOR ASSESSING THE PROVISION OF CARE

A) Defendants shall maintain such records as are necessary for effective and meaningful auditing of the performance of the medical care delivery system at Bedford Hills, including any record required by this Judgment.

B) At a minimum, these records shall include:

- 1) the IPC rounds record mandated by sub-section I(H),
- 2) the screening sign-up list and screening roster referred to in paragraph II(B)(10),
- 3) the Ordered Care File and Laboratory Order Book mandated by paragraphs III(B)(2) & (3),
- 4) the chronically ill recall file mandated by subsection IV(C),
- 5) Division of Health Services form HS-50 "Request for Consultation/Report of Outside Consultation," and.
- 6) The appointment book maintained by the infectious disease specialist, or the alternative infectious disease clinic as required by paragraph V(C)(5).

C) The above listed forms and records will be made available to the monitor upon his request. At reasonable intervals of not less than three months, defendants will provide to plaintiffs' counsel, upon request, portions of the above listed forms and records, as designated by plaintiffs, representing a time period not exceeding two weeks, except that the infectious disease physician appointment book shall be made available to plaintiffs' counsel without these time limitations.

D) Upon request, defendants will make plaintiffs' medical charts available to plaintiffs' counsel. Defendants will notify the monitor and plaintiffs' counsel of any inmate death at Bedford Hills or at an outside hospital, and will provide the monitor with a copy of the inmate's chart within ten days of the death and the autopsy report within ten days of its receipt

by the facility. Nothing in this sub-section or sub-section VII(C), shall be construed to govern whatever rights plaintiffs have to discovery under the Federal Rules of Civil Procedure or to obtain documents under the New York State Freedom of Information Law.

E) A problem solving group shall be formed and shall meet regularly at least every three months, unless all members agree to a different schedule. This group shall consist of the monitor or his designee, the facility's Medical Director or physician designee, the Superintendent or her designee, the plaintiff class through counsel, counsel for defendants, and the Assistant Commissioner of Health Services or his designee. It shall be the purpose of this group to review both systemic problems in the delivery of health care and individual inmate health care problems. This group shall also convene at the request of a member when important questions arise which cannot be resolved informally and cannot wait until the next-scheduled meeting. If the parties cannot agree on whether to convene a session of this group, this disagreement will be resolved by the Court's monitor, or if the duties of the monitor have ceased in accordance with sub-section XI(B), the Court will resolve this issue.

F) Individual class members have the right to lodge medical complaints through counsel directly to defendants with a copy simultaneously delivered to defendants' counsel. Before such a complaint is lodged, plaintiffs shall make reasonable efforts to resolve the complaint by presenting it to a medical staff member either at screening or at another encounter with medical staff, or through the facility's administrative remedies program, i.e., inmate grievance resolution committee. Plaintiffs' counsel shall use their best efforts to confirm that such efforts have been made before submitting a written complaint. Defendants' counsel will make their best efforts to respond about the complaint, either orally or in writing, as they choose, to plaintiffs' counsel within ten days of the receipt of the complaint. In the event that a complaint is in regard to an urgent situation, the complaint may be made without resort to the above described dispute resolution

mechanisms; the emergency complaint may be made orally or in writing and defendants' counsel will make their best efforts to provide an oral or written response within 24 hours. Plaintiffs agree to hold defendants' counsel harmless for contempt for any failure to perform a duty imposed upon them by this sub-section.

VIII. AIDS TRAINING, COUNSELING AND PROTOCOLS

A) Defendants will prepare, maintain and follow a protocol concerning the professionally sound treatment of inmates with HIV related illness. A copy of the protocol will be provided to the monitor and plaintiffs' counsel. The protocol shall not be changed without affording the monitor and plaintiffs' counsel notice of the proposed change and an opportunity to discuss it with defendants. At a minimum this protocol shall provide:

1) For weekly monitoring of IPC inmates who are diagnosed as having AIDS or ARC, and for systematic examinations of other inmates who are so diagnosed, by the physician described in sub-section V(C). This physician shall also be kept informed of the status of other HIV+ inmates and of all patients admitted to and confined in IPC.

2) For examinations by the physician described in sub-section V(C) of other HIV+ inmates who present to medical staff with possible symptoms of opportunistic AIDS infection.

3) For the appropriate counseling of all inmates during inmate orientation regarding HIV testing, of inmates who are HIV+, of inmates pre and post HIV testing and for appropriate notification of HIV test results.

4) For programs of inservice training for facility nurses, within a reasonable time of their appointment at Bedford Hills, which focus on diagnoses and treatment of HIV related illness. Any nurse who has not received this inservice training will not be permitted to make critical medical decisions

regarding the evaluation or course of treatment of any inmate who is HIV+, unless said nurse has been certified by the facility Medical Director as having had comparable and suitable other training or experience in the treatment of HIV related illness.

5) written medical guidelines concerning HIV related illness, its diagnosis, treatment, use of medications including AZT and pentamidine, and recognition and treatment of opportunistic infections. Such guidelines shall be available in IPC and during screening.

B) All correction officers at the facility will participate in Departmental training on AIDS as required by the Department of Correctional Services.

C) Upon the termination of sub-sections VIII(A) & (B) in accordance with the provisions of sub-section XI(D), the following provisions shall apply: Defendants shall maintain and follow a protocol concerning the appropriate diagnosis, treatment and care of inmates with HIV related illness by the physician described in sub-section V(C), and for the training of other medical staff in the recognition, diagnosis and treatment of persons with HIV related illness. This protocol will also address necessary inservice training for medical staff regarding HIV related illness and will provide for the counseling of inmates about AIDS and HIV testing.

IX. RESTRAINTS DURING MEDICAL TRIPS

If a member of the facility medical staff determines that the use of a particular restraint is medically contra-indicated for a medical trip, he or she shall inform the Deputy Superintendent for Security of his or her concerns. Defendants shall not use the "black box" unless the Deputy Superintendent for Security or his designee believes it is necessary for reasons of security. Nothing in this Section shall have any preclusive effect on any legal or administrative challenges made by any plaintiff to the use of restraints during medical trips.

X. NOTICE AND POSTING OF MODIFIED JUDGMENT

A) Except as provided in sub-section X(B), a copy of this modified judgment shall be available in English or Spanish as appropriate and shall be:

1) distributed to all inmates currently incarcerated at Bedford Hills;

2) distributed to all incoming Bedford Hills' inmates at their orientation; and

3) posted in the hospital building, IPC, and the law library.

B) plaintiffs; counsel shall submit to defendants' counsel a simplified explanation of this modified judgment which may be distributed in accordance with sub-section X(A).

C) Upon the termination of sub-sections. X(A) and (B) in accordance with sub-section XI(D), a simplified document reflecting the surviving terms of this Judgment shall be distributed in accordance with paragraphs X(A)(1), (2) & (3). This document shall consist of a verbatim listing of the surviving portions of the Judgment and shall contain an additional portion identifying counsel for plaintiffs.

XI. COMPLIANCE

A) In the event that plaintiffs' counsel believes that defendants are not in compliance with this Judgment, plaintiffs' counsel shall bring the facts supporting that belief to the attention of defendants' counsel at a meeting of the problem solving group and give defendants an opportunity to correct the alleged problem prior to counsel's filing of any motion concerning such alleged non-compliance.

B) At the conclusion of three (3) years from the date of entry of this Judgment, unless extended by the Court based upon an assessment that defendants have not been in compliance with this Judgment, or cannot reasonably be expected to maintain compliance, and then at the conclusion of that extended period, the Court will terminate its orders of

December 1, 1980 and April 8, 1981 appointing a monitor to assist the Court in measuring defendants' compliance with the terms of this Judgment, and all subsequent orders regarding appointment and reimbursement of the monitor and the monitor's assistants, and the duties of the court's monitor and his assistants will terminate.

C) At the conclusion of two (2) years from the date that the duties of the monitor and his assistants terminate, unless extended by the Court based upon an assessment that defendants have not been in compliance with this Judgment, or cannot reasonably be expected to maintain compliance, and then at the conclusion of that extended period, the requirements of sub-sections I(H); VI(C)(1), but not VI(C); and VII(C), (D) & (E) of this Judgment shall cease to bind the defendants as well as their successors, agents, employees, assigns and those acting in concert with them.

D) At the conclusion of two (2) years from the date that the provisions set forth in sub-section XI(C) cease to bind the defendants, unless extended by the Court based upon an assessment that defendants have not been in compliance with this Judgment, or cannot reasonably be expected to maintain compliance, or cannot reasonably be expected to provide Constitutionally required medical care, and then at the conclusion of that extended period, the requirements of sub-sections I(A)-(G), (I) & (J); II(A) & (B); III(A), (B) & (C); V(B)(4); VI(B); VII(B)(1)-(6) & (F); VIII(A) & (B); and X(A) & (B) shall cease to bind the defendants as well as their successors, agents, employees, assigns and those acting in concert with them.

E) For any motion brought by either party, the fact that this Judgment was entered by consent will not affect the Court's standard of review.

F) The terms of this Judgment are a product of the particular circumstances surrounding the delivery of medical care at Bedford Hills Correctional Facility. They do not apply to any other facility.

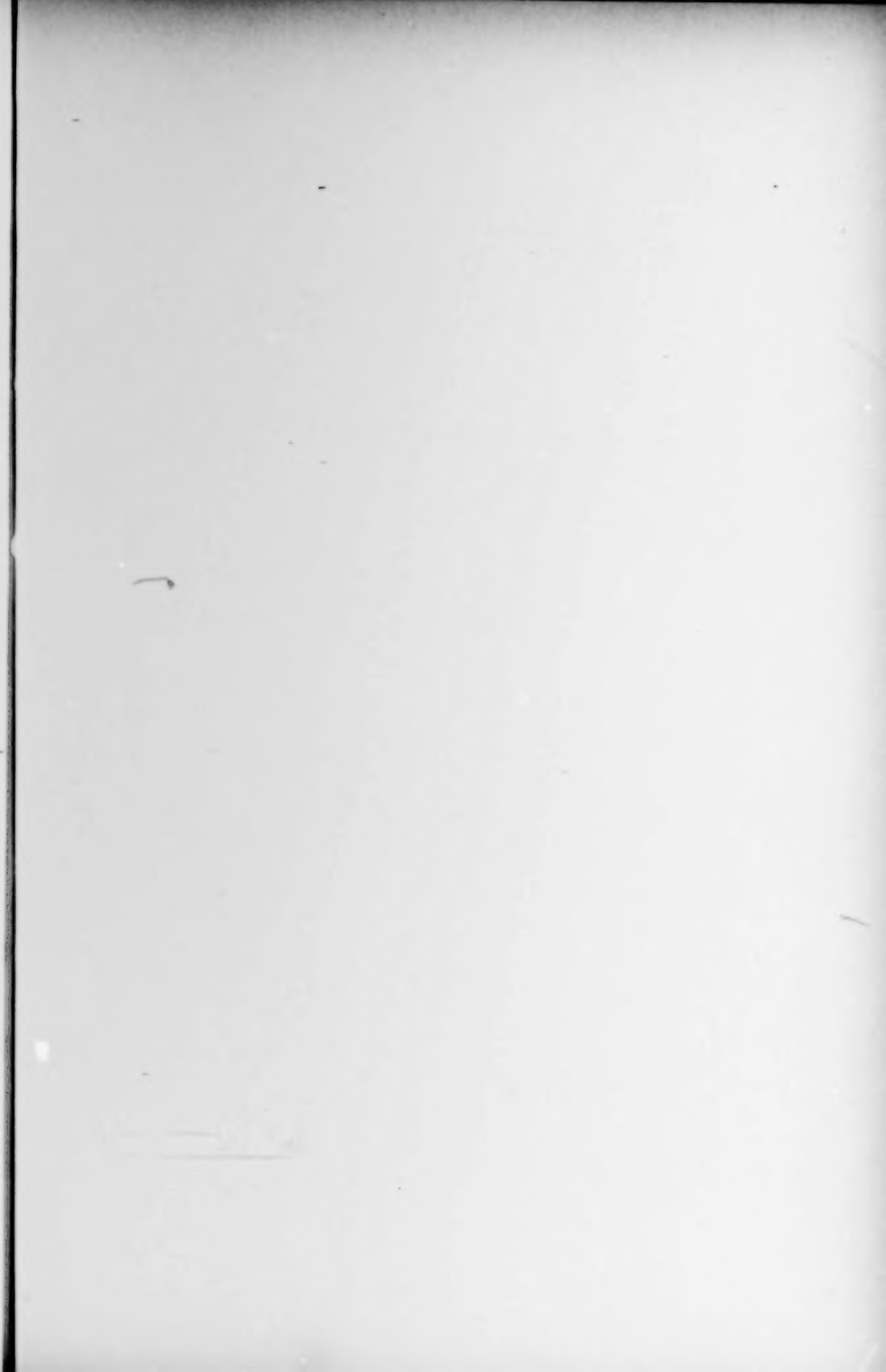
Dated: New York, New York
June 26, 1989

PHILIP L. WEINSTEIN
DORI A. LEWIS
MICHAEL WISEMAN
The Legal Aid Society
Prisoners' Rights Project
15 Park Row-7th floor
New York, New York 10038
(212) 577-3530

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendants
120 Broadway
New York, New York

BY:

BARBARA B. BUTLER
DARREN O'CONNOR
Assistant Attorneys General



14 14
Nos. 90-954, 90-1004

Supreme Court, U.S.
FILED

MAY 31 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,
Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF OF
ALLEN F. BREED, ET AL.
IN SUPPORT OF RESPONDENTS

SHELDON KRANTZ
(Counsel of Record)
Piper & Marbury
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-3900

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

BEST AVAILABLE COPY

27

Nos. 90-954, 90-1004

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,
Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

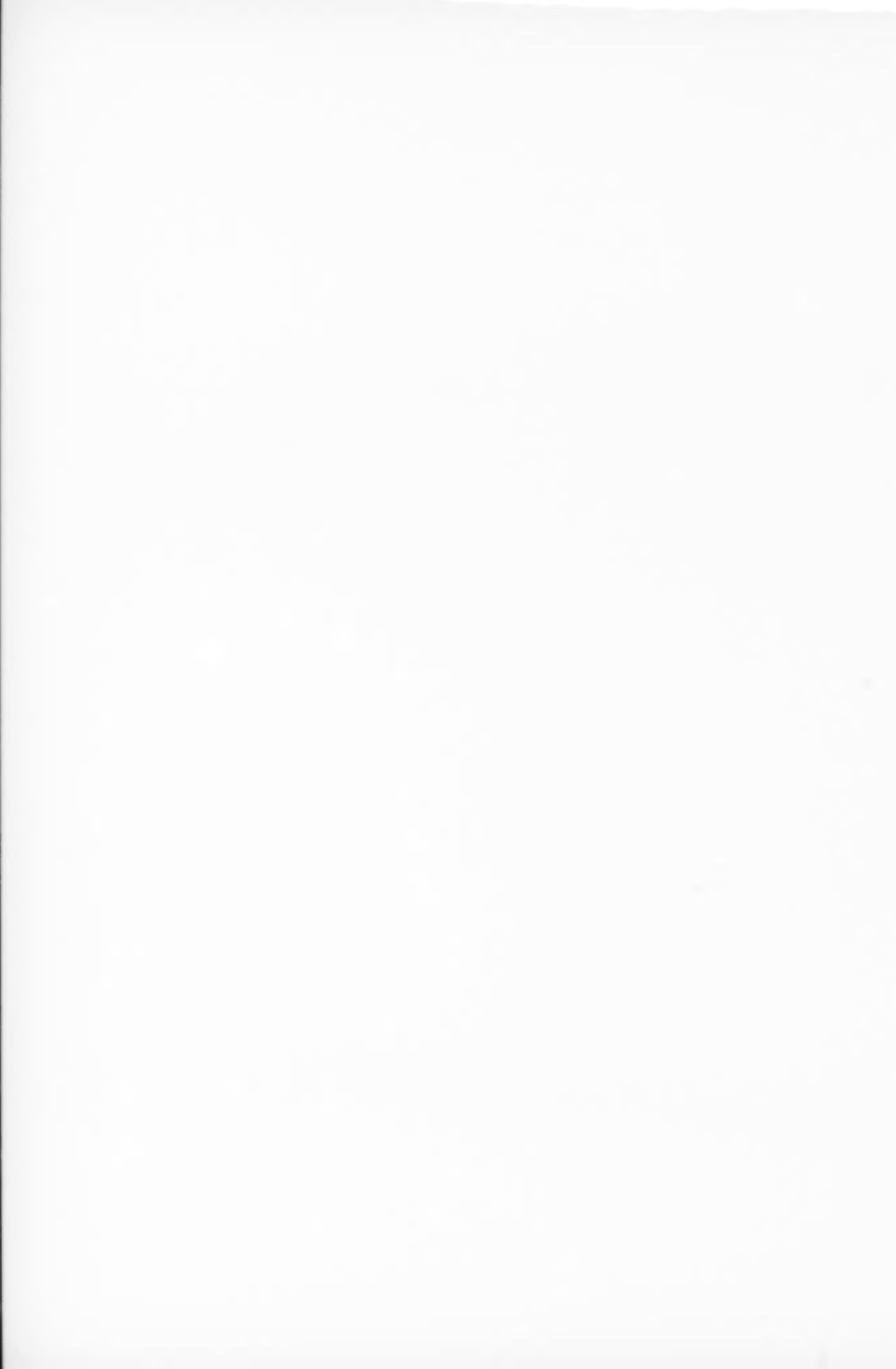
TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF <u>AMICI CURIAE</u>	1

STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	5
ARGUMENT	7
CONSENT DECREES PROVIDE THE MOST EFFECTIVE MEANS BY WHICH CORRECTIONAL OFFICIALS CAN PLAY A MEANINGFUL ROLE IN SHAPING THE OUTCOME OF INSTITUTIONAL REFORM LITIGATION	7
UNLESS CONSENT DECREES ARE ENFORCEABLE, THEY WILL CEASE TO BE AN OPTION AVAILABLE TO CORRECTIONAL OFFICIALS INVOLVED IN INSTITUTIONAL REFORM LITIGATION.	11
CONSENT DECREES PERMIT CORRECTIONAL OFFICIALS TO MAINTAIN CONTROL OVER STAFF AND PRISONERS DURING THE COURSE OF THE REMEDIAL PROCESS, AND THUS CONTRIBUTE TO THE SAFETY AND SECURITY OF CORRECTIONAL INSTITUTIONS.	16
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	PAGE
<u>Block v. Rutherford</u> , 468 U.S. 576 (1984)	14
<u>Duran v. Elrod</u> , 760 F.2d 756 (7th Cir. 1985).	15
<u>Local Number 93 v. City of Cleveland</u> , 478 U.S. 501 (1986)	12
<u>New York State Assn. for Retarded Children v. Carey</u> , 706 F.2d 956 (2d Cir. 1983), <u>cert. denied</u> , 464 U.S. 915 (1983) . . .	16
<u>Ruiz v. Lynaugh</u> , 811 F.2d 856 (5th Cir. 1987)	16
<u>United States v. Swift & Co.</u> , 286 U.S. 106 (1932)	15



Nos. 90-954, 90-1004

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,
Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

INTEREST OF AMICI CURIAE

Pursuant to Rule 37.3 of the Rules of
the Supreme Court of the United States, Allen
F. Breed, Raymond Procunier, Walter Dickey,

James G. Ricketts, Maurice H. Sigler, Gordon Kamka, Kenneth Schoen, Jerry Enomoto, Patrick McManus, David Fogel and Warren Benton hereby file this brief amicus curiae in support of respondents. The written consents of petitioners and of respondents have been filed with the Court.

These amici are senior corrections officials who have served as directors of various state correctional agencies throughout the United States. Several have entered into consent decrees during the course of one or more of their directorships. Individually and in combination, these amici represent many years of experience in administering correctional systems, including systems that have been the subjects of correctional reform litigation. These amici have joined together for the purpose of submitting this brief because of their strong interest in the establishment and maintenance of constitutional conditions in prisons and

jails throughout the United States and because of their belief that the safe and orderly implementation of institutional reform is promoted by the use of effective consent decrees.

Allen F. Breed is the former Director of the California Youth Authority. He also served as the first Director of the National Institute of Corrections within the United States Department of Justice.

Raymond Procunier is the former Director of Corrections in the states of Utah, California, Virginia, and Texas. He currently is the Inspector General of the Nevada Department of Prisons.

Walter Dickey is the former Director of the Wisconsin Department of Corrections. He is now a Professor of Law at the University of Wisconsin School of Law.

Maurice H. Sigler is the former Director of the Nebraska Department of Corrections. He also served as the Chairman of the United

States Parole Commission.

James G. Ricketts is the former Director of the Colorado and Arizona Departments of Corrections and is now a corrections consultant.

Gordon Kamka is the former Secretary of the Maryland Department of Public Safety and Correctional Services and is currently Director, Facilities Review Panel, West Virginia Supreme Court of Appeals.

Kenneth Schoen is the former Commissioner of the Minnesota Department of Corrections and is now a foundation official and corrections consultant.

Jerry Enomoto is the former Director of the California Department of Corrections and is a Commissioner of the Commission on Accreditation, American Correctional Association.

Patrick McManus is a former Director of the Kansas Department of Corrections and is a corrections consultant.

David Fogel is a former Commissioner of the Minnesota Department of Corrections, Director of the Illinois Law Enforcement Commission and Chief Administrator of the Chicago Police Department's Office of Professional Standards. He is now a Professor of Criminal Justice at the University of Illinois.

Warren Benton is the former Director of the Oklahoma and Missouri Corrections Departments.

STATEMENT OF THE CASE

The amici adopt respondents' statement of the case as their own.

SUMMARY OF ARGUMENT

Consent decrees are essential to the orderly resolution of institutional reform litigation affecting prisons and jails. They avoid protracted and distracting litigation and maximize the effect correctional leadership has on the selection and implementation of safe and appropriate remedies. Of critical

importance, consent decrees minimize the risk that the remedies selected will be impractical and dangerous and that unrealistic timetables for compliance will be imposed.

Consent decrees will cease to be a viable option if their provisions, including those that exceed constitutional minima, can be abolished unilaterally by correctional and other governmental officials upon an assertion that a correctional system has met the minimal requirements of the Constitution. The legitimate interests of these officials do not require adoption of such a rule. Indeed, the effect of such a rule will be that time-consuming and destabilizing litigation will be required in all cases.

In addition to maximizing the input of correctional officials and avoiding counterproductive litigation, consent decrees make it possible for correctional administrators to maintain safe and secure conditions within the correctional system

during the remedial process. The cooperation of staff and prisoners is promoted by the knowledge that institutional reforms have been agreed to by correctional leadership; that essential cooperation, however, is dependent upon reasonable assurances that remedies agreed to by correctional leadership will be of a lasting nature.

ARGUMENT

CONSENT DECREES PROVIDE
THE MOST EFFECTIVE MEANS BY WHICH
CORRECTIONAL OFFICIALS CAN PLAY A
MEANINGFUL ROLE IN SHAPING THE OUTCOME OF
INSTITUTIONAL REFORM LITIGATION

Some stipulations leading to consent decrees are entered into prior to any finding of liability; others follow a trial establishing that conditions in a correctional system are unconstitutional and are intended to shape the remedial action correctional officials will be required to take to correct these conditions. In both instances, the use of consent decrees offers correctional officials the best means by

which to shape the outcome of litigation and to preserve the limited resources of the correctional system.

Protracted litigation disrupts the operation of a correctional system by taxing the management and line staff of institutions and the central office. Time spent collecting documentation, appearing at depositions, and testifying in court detract from the ability of senior and other staff to discharge their routine, but critically important, administrative functions. Thus, when it appears likely that a trial will result in a finding of unconstitutionality, the interests of a correctional system are best served by settlement.

A principal value of a negotiated settlement under these circumstances is the opportunity it provides for correctional officials to have substantial input into the selection of remedies. The negotiation process offers several critically important

advantages over the uncertainties of litigated outcomes.

First, the negotiation process assures that correctional expertise will influence, to the greatest extent possible, the determination of what is to be remedied and what remedial measures are to be employed. It avoids the possibility that impracticable remedial plans will be developed independently by trial courts or, in some instances, by special masters, without the benefit of the knowledge and experience of those who are best equipped to develop policies and procedures to remedy unconstitutional conditions. The correctional expertise to which trial courts repeatedly have been directed to defer is of critical importance in shaping practical remedies and is more effectively exercised at the bargaining table than in the courtroom.

Second, a negotiated settlement offers correctional officials an opportunity to

affect the establishment of priorities for implementation of complex and interrelated remedial actions and to integrate those actions into an orderly process. The importance of the timing of implementation of complex remedial measures in a correctional system cannot be overstated. Simultaneous action cannot be taken on all fronts, both because of limited resources and because the absence of reasonable priorities will lead to administrative chaos and destabilization of the system. In short, implementation of remedial actions according to a realistic timetable is essential to the safety and security of staff and prisoners, and this objective is promoted by the use of consent decrees.

Third, the negotiation process offers correctional officials an invaluable opportunity to educate other governmental officials who are involved in the litigation process, as well as prisoners' attorneys,

about the complexity of the reform process in correctional systems. Thus, the process encourages cooperation on the part of all involved in a joint effort to bring about reform while maintaining safe and secure institutions.

In summary, it is the consent decree that offers correctional officials the maximum opportunity to influence the remedial process. As a result, negotiated resolution is calculated to assure that the remedial action ultimately approved by the trial court will be feasible, safe, and effective. For this reason, settlement should be encouraged in institutional reform cases as it is in all other types of litigation.

UNLESS CONSENT DECREES ARE ENFORCEABLE,
THEY WILL CEASE TO BE AN OPTION
AVAILABLE TO CORRECTIONAL OFFICIALS
INVOLVED IN INSTITUTIONAL REFORM LITIGATION.

The question before the Court that is of greatest interest to these amici is the enforceability of a consent decree that

contains provisions that, in some respects, may exceed constitutional minima. These amici believe that the Court's ruling in Local Number 93 v. City of Cleveland, 478 U.S. 501 (1986), should control the enforceability of consent decrees in the context of institutional reform litigation, including those decrees that contain provisions that exceed constitutional minima. This conclusion is based on compelling practical considerations implicating the safety of staff and prisoners alike. Unless they can be assured that a consent decree will be enforceable, prisoners' lawyers will insist upon litigated findings and remedies. Presumably, a trial court will address only those conditions that clearly fall below minimal constitutional standards and will impose only those remedies it finds essential to address those conditions; otherwise, appellate review will pare overly expansive remedial action ordered by the trial court.

Thus, through litigation, prisoners' attorneys will gain a measure of certainty that the order they obtain will be permanently enforceable.

This measure of certainty, however, exacts a high price on correctional officials and the systems they administer. The adversarial process creates uncertainty with respect to the nature and extent of remedies that will be ordered. It deprives correctional officials of control over the allocation of limited human and financial resources during the course of the remedial process and threatens to establish timetables for the achievement of compliance that are unrealistic and dangerous.

The advantages of negotiated settlement explain why correctional officials, as well as the governmental officials to whom they answer, sometimes will opt for the provision of services or the maintenance of conditions that may exceed constitutional minima. Having

acknowledged that the total absence of any visiting program is unconstitutional, for example, a jail administrator may find that the provision of contact visiting is both feasible and desirable. As a result, the administrator may be willing to offer a contact visiting program in order to gain important concessions relating to the substance or timing of other remedial action that threatens to interfere with the orderly operation of the institution or to consume inordinate resources. Although the Court has held that the requirement of a contact visiting program in a jail exceeds constitutional minima, Block v. Rutherford, 468 U.S. 576 (1984), governmental officials should be free to make a conscious and binding decision to provide such a program in exchange for a higher degree of population density or other objectives to which they attach greater importance.

This argument does not imply that consent decrees incorporating complex, interrelated remedies should be cast in stone. Throughout the course of the remedial process, changes of direction often will be dictated by unanticipated obstacles and by fuller appreciation of problems that all parties gain through cooperative efforts at implementation. When necessary, modification of the consent decree can be obtained either by mutual agreement or by an order approving one party's request for modification. See, e.g., Duran v. Elrod, 760 F.2d 756, 758 (7th Cir. 1985) (reversing, under the standard set forth in United States v. Swift, 286 U.S. 106 (1932), district court's denial of modification of jail conditions consent decree). While we believe that the standard set forth in Swift remains adequate to balance the interests in finality and adaptation to changing circumstances, we note that the trial court in this case also denied

modification under the standard of New York State Ass'n. for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). The Carey standard, when properly construed as a standard that preserves the essentials of the parties' bargain, can also support the interest in stability that is necessary if consent decrees are to fulfill their essential functions. See, e.g., Ruiz v. Lynaugh, 811 F.2d 856, 862 (5th Cir. 1987) (affirming denial of motion to modify prison overcrowding consent decree under Carey standard).

CONSENT DECREES PERMIT CORRECTIONAL
OFFICIALS TO MAINTAIN CONTROL OVER STAFF AND
PRISONERS DURING THE COURSE OF THE
REMEDIAL PROCESS, AND THUS CONTRIBUTE
TO THE SAFETY AND SECURITY OF CORRECTIONAL
INSTITUTIONS.

The period during which fundamental changes are being made in the operation of a correctional institution or system is a trying one for correctional officials.

Prisons and jails are dangerous places under the best of circumstances. The unsettling process of fundamental change increases danger to staff and prisoners alike unless correctional administrators both remain in control and are perceived as remaining in control of the system.

Staff often become demoralized when they are identified as part of a system that has been branded unconstitutional. Furthermore, as members of an organization designed largely on a para-military model, they are inclined to resist change perceived as being imposed by "outsiders" contrary to the wishes of the warden and the director of corrections. If the remedies that are implemented are understood to include the choices and judgments made by their correctional leaders, however, staff are more likely to provide the degree of cooperation that is essential if the required remedial objectives are to be achieved in an orderly and safe manner.

The remedial process also produces a period of unrest and tension within the prisoner population. With the public vindication of constitutional rights come unrealistic expectations that all grievances will be redressed and that, somehow, a constitutional prison will be a pleasant place to live. If prisoners correctly perceive that changes are occurring because they were agreed to, and in many instances desired, by correctional and other governmental authorities, they are more likely to understand that the effect of the court's finding of liability is not to turn the institution or system over to the prisoners,

but instead presages a period of gradual and controlled change.¹

The absence of cooperation by staff and prisoners during the unsettling period that marks the reform of unconstitutional correctional facilities and systems not only is likely to doom the reform effort, but it also increases already heightened tensions to a point of unacceptable danger. The authority of correctional administrators during this period will be promoted, both among staff and among prisoners, by the knowledge that the changes that are occurring were influenced strongly and ultimately agreed to by correctional leadership.

¹ Although correctional reform litigation accomplishes important and fundamental changes in the operation of a correctional system, it is our consistent experience that the extent of change rarely meets the full expectations of the prisoners. This reality creates operational difficulties that are extremely dangerous in the absence of control by correctional administrators.

Closely related to the perceptions of prisoners and staff is the issue of trust among correctional administrators, correctional staff, and prisoners. Once agreed to, provisions of a consent decree provide the basis for the creation of a new status quo within correctional facilities. Staff are trained and directed in new policies and procedures, and prisoners are offered legitimate expectations that these policies and procedures will be implemented.

A sense of permanency regarding the fundamental elements of the operation of a correctional agency is critical to the maintenance of secure and safe conditions for prisoners and staff. Thus, when correctional officials agree to fundamental changes of policy and procedure, and their agreement is sanctioned by appropriate state or local governmental officials, reasonable assurances that these changes will be of a lasting nature are essential. In the absence

of these assurances, neither staff nor inmates will cooperate during the difficult period of institutional transition.

A consent decree is an expression of the commitment of correctional and governmental leadership, staff, and prisoners to create a new and improved status quo within the world in which prisoners and staff live and work. The possibility that solemn undertakings, including those that extend beyond constitutional minima, may be discarded unilaterally when the correctional agency achieves overall constitutional standards is a dangerous one. Although on one level, the prison community is one that is characterized by widespread mistrust between prisoners and officials, maintenance of order rests essentially on the assumption by prisoners and staff that decisions, once made and announced at the highest level of the correctional agency, will be honored. In short, prison officials who enter into consent decrees,

with the support of the agencies of government to whom those officials report, must keep their word and must be perceived as keeping their word in order to avoid a descent into violent chaos following the conclusion of the remedial process.

CONCLUSION

Ironically, a decision that undercuts the presumed continued effectiveness of all agreements incorporated into a consent decree will bring about more, not less, judicial intrusion into the operation of correctional facilities. A predictable consequence of such a decision is that all aspects of the remedial process will be litigated by prisoners' attorneys, rather than negotiated, in order to guarantee that remedial measures that are adopted are consonant with judicial determinations of constitutional minima and, thus, presumptively of lasting application. As a result, correctional and other governmental officials will have less, rather

than more, control over the critically important remedial phase of institutional reform litigation. The effect of the adoption of petitioners' argument, in the considered opinion of these amici, will be one of disastrous proportions to correctional agencies struggling to bring about constitutional conditions while maintaining the safety and stability of institutions that must continue to operate on a day-to-day basis throughout the remedial process.

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Sheldon Krantz
(Counsel of Record)
Piper & Marbury
1200 Nineteenth St. N.W.
Washington, D.C. 20036
(202) 861-3900
Attorney for Amici Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Amici will address the following question:

In institutional reform litigation, what specific standards should a court apply to assess whether a party seeking modification of a consent decree has carried its burden of justifying the proposed change?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	(i)
TABLE OF CONTENTS.....	(ii)
TABLE OF AUTHORITES.....	(v)
INTEREST OF AMICI	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE COURTS SHOULD APPLY A FLEXIBLE STANDARD OF MODIFICATION THAT RESPECTS THE COMPLEX BARGAINED INTERRELATIONSHIP AMONG CONSENT DECREE PROVISIONS.....	8
II. THE CURRENT FLEXIBLE MODIFICATION STANDARD IS INADEQUATE BECAUSE IT DOES NOT ACKNOWLEDGE THE CAUTION NEEDED IN MODIFYING THE INTERDEPENDENT PROVISIONS OF CONSENT DECREES AND BECAUSE IT DOES NOT LEAD TO UNIFORM RESULTS.....	11

Table of Contents (Continued)

Page

III.	THE COURTS SHOULD APPLY A FOUR-STEP ANALYSIS THAT TAKES INTO ACCOUNT THE SPECIAL FEATURES OF INSTITUTIONAL CONSENT DECREES	14
A.	To Support a Modification, the Moving Party Should Show That Compliance Is Not Possible Due to Changed Circumstances and That It Did Not Assume the Risk of Such Changed Circumstances Under the Consent Decree	15
B.	The Moving Party Should Have the Burden of Showing That the Change is Necessary To Achieve, and Is Consistent With, the Original Purposes of the Consent Decree	17
1.	The Consent Decree Should Be the Starting Point in Examining the Purposes of the Decree.....	17

Table of Contents (continued)	Page
2. The Modification of One Provision Should Be Favored If It Would Assist in Achieving A Paramount Practical Objective of the Decree	19
C. A Court Assessing Good Faith Efforts To Comply Should Examine the Reasons for Noncompliance and Defendants' Efforts To Explore Feasible Alternatives to Modification.....	21
D. If the Other Elements Of the Test Are Not Met, Only Temporary Modifications Should Be Permitted, and Even Then Only If The Moving Party Shows That Enforcement Would Demonstrably Harm the Public Welfare.....	24
IV. THE APPLICATION OF OUR SUGGESTED TEST TO THE DECISION OF THE DISTRICT COURT.....	26
CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases:	Page
<i>Badgley v. Santacroce</i> , 853 F.2d 50 (2d Cir. 1988).	12, 17, 21
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	3
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985).	23, 24, 25, 26
<i>International Ass'n of Fire- Fighters v. Cleveland</i> , 478 U.S. 501 (1986)	18
<i>Nelson v. Collins</i> , 659 F.2d 420 (4th Cir. 1981).	25
<i>New York State Ass'n for Retarded Children, Inc. v. Carey</i> , 706 F.2d 956 (2d Cir.), <i>cert. denied</i> , 464 U.S. 915 (1983)	9, 12, 19, 20
<i>Philadelphia Welfare Rights Organization v. Shapp</i> , 602 F.2d 1114 (3d Cir. 1979), <i>cert. denied</i> , 444 U.S. 1026 (1980).	12

<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir.), cert. denied, 488 U.S. 897 (1988)	12, 16, 24
<i>Ruiz v. Lynaugh</i> , 811 F.2d 856 (5th Cir. 1987)	12, 15, 19, 20, 21
<i>Twelve John Does v. District of Columbia</i> , 861 F.2d 295 (D.C. Cir. 1988)	passim
<i>Twelve John Does v. District of Columbia</i> , 855 F.2d 874 (D.C. Cir. 1988)	1, 25
<i>Twelve John Does v. District of Columbia</i> , 80-2136 (D.D.C. 1982)	1
<i>United States v. Armour & Co.</i> , 402 U.S. 673 (1971)	18
<i>United States v. ITT Continental Baking Co.</i> , 420 U.S. 223 (1975).	18
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932)	4, 8, 15

Other Authorities:

- Chayes, *Foreword: Public Law
Litigation and the Burger Court*,
96 Harv. L. Rev. 4 (1982) . . . 9

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. 90-954
Robert C. Rufo, Sheriff of Suffolk
County, *et al.*, *Petitioners*
v.
Inmates of the Suffolk County Jail,
et al., *Respondents*

No. 90-1004
George C. Vose, Commissioner of
Correction, *Petitioner*
v.
Inmates of the Suffolk County Jail,
et al., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**BRIEF FOR THE INMATES OF THE LORTON
CENTRAL FACILITY IN AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

INTEREST OF THE *AMICI CURIAE*¹

Amici are inmates confined at the Lorton Central Facility in Lorton, Virginia. The Central Facility is operated by the District of Columbia Department of Corrections. The *amici* constituted the plaintiff class in *Twelve John Does v. District of Columbia*, 80-2136 (D.D.C.), a prisoner class action in which a consent decree was entered in April 1982. The defendant prison officials in that case have sought various amendments to that consent decree and may well seek additional amendments in the future. See, e.g., *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988) (affirming district court refusal to modify consent decree population lid). *Amici* are interested in developing the proper legal standards for reviewing such modification requests and offer their experience to assist the court in resolving this question.

STATEMENT OF FACTS

In June 1973, the federal district court in Boston, Massachusetts found that conditions in the Suffolk County Jail in Boston violated the Due Process Clause of the Fourteenth Amendment. Pet. App. 23a-54a. The jail was used to hold pre-trial detainees who had not been convicted of a crime. Among other deficiencies at the jail, the court found that two inmates were often housed in cells designed for single occupancy. This double-celling led to increased violence in the prison, since there was no method for identifying those

¹Petitioners and respondents have consented to the filing of this brief. Letters are being filed with the Clerk of the Court herewith.

prisoners who could not safely be housed with other prisoners. Pet. App. 25a-35a. The court concluded that these conditions amounted to unconstitutional punishment of the inmates. *Id.* at 40a.

In May 1979, the parties agreed to a consent decree that provided for the construction of a new jail. Pet. App. 15a-22a. The consent decree incorporated by reference a comprehensive architectural plan describing various features of the new jail, including cells designed for single inmate occupancy. *Id.* at 16a.

The consent decree was modified several times. The number of cells included in the initial plan for the facility was based on projections of a decline in the prison population. 90-954 Pet. 4. By 1985, however, "[t]he parties realized that the projections of the detainee population on which the original plans were based were flawed, and that a jail with a larger capacity would be needed." Pet. App. 7a-8a. The district court's Order of April 11, 1985, which granted the modification request to increase the number of cells in the new prison, states that "single-cell occupancy [must be] maintained." The design was modified again after 1985 to contain 453 cells. 90-954 Pet. 5. Construction of the new jail was completed in 1990.

On July 17, 1989, the Sheriff of Suffolk County moved in district court to modify the consent decree to permit double-celling in 197 of the 282 regular male cells in the new jail. 90-954 Pet. 6. He argued that double-celling was needed because of continuing increases in the pre-trial detainee population, Pet. App. 10a, and that double-celling was constitutional under *Bell v. Wolfish*, 441 U.S. 520 (1979). Pet. App. 8a-9a.

The district court denied the Sheriff's motion. Pet. App. 5a-14a. It stated that under the standard articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), a clear showing of grievous wrong evoked by new and unforeseen conditions would be needed in order to change the consent decree. Pet. App. 8a. The court found that the increases in the detainee population were "neither new nor unforeseen." Pet. App. 10a.

The court went on to find that under the "flexible" standard applied by some courts of appeals in scrutinizing modification requests, this request would still be denied. Pet. App. 12a. Denial was required, the court found, because the proposed modification would violate one of the primary purposes of the consent decree -- "to ensure that conditions of confinement for the pretrial detainees meet agreed upon standards." Pet. App. 12a. The court stated that "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element." Pet. App. 12a.

The court rejected the Sheriff's argument that double-celling would comply with constitutional standards. The court stated that permitting relief on the basis of legal standards as defined outside of the decree would decrease the value of settlements. "It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by a court that induces participation in it." Pet. App. 12a.

The district court rejected the Sheriff's argument that modification should be allowed because enforcement of the

decree might cause the release of some pretrial detainees. The court found that any release of detainees would be caused by the legislature's choice not to provide the Sheriff with adequate fiscal resources to allow other methods of compliance with the decree. Pet. App. 13a.

The court of appeals affirmed on the basis of the district court's opinion. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

Because they are often complex, future-oriented plans, prison consent decrees may require modification in the light of experience and changed circumstances. Because the provisions of such decrees are often interdependent, however, they should be modified cautiously, so as to preserve the carefully bargained balance among decree provisions and thereby achieve the original purposes of the decree. We agree with *amici* the United States and the International City Management Association, *et al.*, that this Court should establish a "flexible" standard for such modification that gives due importance to the original purposes of such decrees, as expressed in the parties' own voluntary agreement.

As the courts of appeals have thus far articulated the flexible standard, however, the standard does not produce uniform results or serve as a reliable guide to judicial discretion. Uniformity would be furthered if this Court articulated the burdens of persuasion that should be placed upon the party seeking modification. Based upon years of experience with several requests for modification of the consent decree governing conditions at the Lorton Central Facility, we propose the following standards:

(1) Changed Circumstances. A party seeking modification should demonstrate first that current circumstances have frustrated compliance with the decree, and that in entering into the decree the party did not agree to accept the risk of such circumstances. Absent a specific decree provision to the contrary, courts should not assume that plaintiff inmates have agreed to accept the risk of unexpected increases in the prison population. Such unexpected increases, however, may justify a *temporary* relaxation of a decree's limitation on prison population, in order to allow defendants to take measures to accommodate the increased population.

(2) Consistency of Modification with the Purposes of the Decree. Next, the moving party should demonstrate that the proposed modification is both necessary to achieve the purposes of the original provision of the decree, and consistent with those purposes. To avoid making motions for modification an occasion for relitigation of the underlying controversy, a court should be guided chiefly by the decree provisions, and not by the supposed purposes of the litigation. To deem the "purposes" of the decree to require strict compliance with the precise terms of each of its provisions, however, produces a circular and inflexible analysis. A court should therefore be mindful of the practical interrelationship between decree provisions, and should allow a modification of the duties imposed upon the moving party if a compensating adjustment in other provisions can be made.

Thus, the party seeking modification should show that the proposed change would disrupt the originally agreed-upon plan of relief to the minimum extent possible, that feasible alternatives to modification would not achieve compliance, and that the primary practical objectives of the decree would be served. A court might appropriately permit modification of a

consent decree's population limit in response to unforeseen increases in the number of prisoners, for example, if the defendant were also required to increase correctional officer staffing during the period of the population increase, and if the defendant were required to take additional measures to accommodate the population increase and reduce overcrowding.

(3) Good Faith Efforts. The moving party should demonstrate its good faith efforts to comply with the decree if there is an issue as to whether compliance has genuinely been frustrated by the unexpected circumstances, or merely by the party's unwillingness to comply. A party's good faith efforts may also indicate whether all feasible alternatives to modification have in fact been explored.

(4) The Public Welfare. If a modification would be inconsistent with the purposes of the original provisions of a prison consent decree, and if no feasible alternatives to modification exist, despite the moving party's good faith efforts to comply, a court should deny modification unless the moving party shows that enforcement of the decree would produce an unacceptable threat to the public welfare. We agree with the *amici* International City Management Association, *et al.*, that the mere fact that a municipal defendant finds compliance more expensive than it originally planned should not ordinarily be a valid basis for granting modification. In disputes about whether to enforce prison population limits, defendants should be required to establish that enforcement of such limits would unavoidably cause the release of inmates who would be a danger to the community. Any modification granted on such grounds should be temporary.

A court should not assume, however, that any court ordered reduction in the incarcerated population would pose an inherently unacceptable risk to the public welfare. The enforcement of consent decree population limits in the District of Columbia has prompted the defendant prison officials to adopt a number of innovative solutions to population management.

Each of the above four elements of our proposed standard is discussed below.

ARGUMENT

I. THE COURTS SHOULD APPLY A FLEXIBLE STANDARD OF MODIFICATION THAT RESPECTS THE COMPLEX BARGAINED INTERRELATIONSHIP AMONG CONSENT DECREE PROVISIONS

We do not believe that the modification of consent decrees in institutional reform litigation should be subject to the requirement of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), that the moving party make "a clear showing of grievous wrong evoked by new and unforeseen conditions." The *Swift* case itself did not call for such an imposing standard in the case of decrees "directed to events to come"; such decrees, the *Swift* Court said, were "subject always to adaptation as events may shape the need." *Swift*, 286 U.S. at 114.

We agree with Judge Friendly's observation that consent decrees in institutional reform cases "are not so much peremptory commands to be obeyed in terms, as they are future-oriented plans designed to achieve broad public policy objectives in a complex, ongoing fact situation." *New York*

State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 970 n.17. (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (quoting Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 56 (1982)). Because of the complex, future-oriented nature of such decrees, we agree that the courts should apply a "flexible" standard to requests to modify such decrees, and that modification pursuant to such a flexible standard should be available to both plaintiffs and defendants.

Consent decrees in institutional reform cases, however, must also be generally enforceable according to their terms, so that parties will continue to have an incentive to use such decrees as an efficient method of terminating complex institutional litigation. As the Solicitor General says, it is necessary to recognize and preserve the contractual aspect of institutional consent decrees, for reasons of both fairness and judicial efficiency. Brief for the United States as *Amicus Curiae* at 10-11.

Courts should use caution when they apply a "flexible" modification standard for institutional consent decrees because such decrees are often the product of a painstaking process of negotiating give and take, and the provisions of such consent decrees are often interdependent. For example, the consent decree governing conditions at the Lorton Central Facility, entered in 1982, recognizes explicitly that "all other provisions of this Decree rest fundamentally on the number of residents confined to the facility." The original agreed-upon population limit in the Central Facility decree, which the parties set on an individual basis for each of 25 dormitories on the basis of a number of square feet per inmate, was informed by the parties' recognition that the dormitories did not receive a high level of correctional officer supervision. Such a relative lack

of supervision led to the parties' adoption of a lower population limit than might otherwise have been the case, since it was believed by both sides that crowding in the relatively unsupervised dormitories would increase the level of inmate-on-inmate violence.

When the defendant District of Columbia prison officials sought some years later to place an increased number of officers in the dormitories, and to create officer stations within the dormitories in areas previously used for inmate living space, plaintiff *amici* consented to the increased officer coverage, even though it resulted in a somewhat greater degree of crowding in the dormitories. Because of the increased officer supervision, the number of assaults has declined sharply, and the standard of housekeeping and sanitation has improved, despite the somewhat greater crowding. Since the original practical purposes of the decree were, *inter alia*, to reduce inmate assaults and improve the environmental conditions at the prison, this relaxation of the decree requirements was consistent with, and indeed furthered, the original purposes of the decree.

In an earlier instance, however, we strenuously opposed an attempt by the District of Columbia defendants to increase the population lid. Defendants, because of increased arrests and convictions, placed more inmates in the facility than permitted by the decree, and then sought to modify the decree to ratify the overcrowding. Defendants proposed no increase in security staff, no increase in health services or counselling staff, no improvements to the physical facility, no prison construction or other alternatives to address the growing prison population -- and no time limit for the proposed increase in the population ceiling. Because of the increased population, the number of inmate-on-inmate assaults increased

dramatically, and the number of violations of the local health codes, as noted by defendants' own inspectors, increased markedly as well. The district court refused to allow the requested modification, and the court of appeals affirmed. *Twelve John Does v. District of Columbia*, 861 F.2d 295, 302 (D.C. Cir. 1988) ("*Twelve John Does II*").

These examples demonstrate a common lesson of experience with institutional consent decrees: modifications of such decrees should be responsive to the interrelationships among decree provisions, and modifications that simply seek to reduce the obligations on one party should be disfavored in the absence of a very strong showing of need by the moving party.

II. THE CURRENT FLEXIBLE MODIFICATION STANDARD IS INADEQUATE BECAUSE IT DOES NOT ACKNOWLEDGE THE CAUTION NEEDED IN MODIFYING THE INTERDEPENDENT PROVISIONS OF CONSENT DECREES AND BECAUSE IT DOES NOT LEAD TO UNIFORM RESULTS

The courts of appeals that have recognized or adopted the "flexible" test have generally required that the moving party make four showings: (i) that there exist "changed circumstances"; (ii) that the requested modification would be consistent with the purposes of the consent decree; (iii) that the moving party has attempted in good faith to comply with the decree; and (iv) that the modification would be consistent

with the public interest.² We believe that this commonly employed four-part inquiry is potentially a useful guide to judicial discretion that could give adequate weight to the competing interests of the parties to institutional consent decrees.

The courts of appeals, however, have thus far failed to particularize the four factors sufficiently to provide the "flexible" test with any real meaning. The courts have failed to inquire what sorts of changed circumstances should entitle a party to modification. They have failed to define what is meant by the "original purposes" of a decree, so that some courts have equated such purposes with the purposes of the litigation, and have thereby allowed defendants freely to reopen the underlying constitutional questions that the decree was intended to settle. *E.g.*, *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988). Others have erred in the opposite direction by interpreting the purposes of a decree to be synonymous with its literal provisions, so that any departure from the terms of the decree is ipso facto inconsistent with its "purposes." The courts have also failed to identify the logical relevance of the "good faith" inquiry,

2 See, e.g., *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988); *Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988); *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

Twelve John Does II, 861 F.2d at 300, or the place of the "public interest" inquiry in the analysis.

A similar variety of interpretations of the flexible test is evident in the briefs submitted by petitioners and several amici. An extreme view of the test is represented by Petitioner Robert C. Rufo. He suggests that one of the major factors a court should consider in support of modification is any adverse effect of the current decree on a public official defendant or the public interest, and that the purposes of the consent decree should be defined in terms of external provisions, including judicial decisions reached after the entry of the consent decree. See Brief of Petitioner Robert C. Rufo at 32. This view, which almost completely ignores the contractual attributes of consent decrees, is supported by the Attorneys General of several states, who suggest that "[a] federal consent decree binding state officials should be modified as necessary to ensure that it is no more intrusive than required to protect federal rights." Brief *Amici Curiae* for the State of Tennessee, *et al.*, at 4. Under such a scheme, the court becomes a perpetual groundskeeper, charged with lopping off decree provisions that stray over the bounds of constitutional minima. The agreement of the parties -- the consent decree -- has essentially no weight in this scheme.

A more sensible balance is suggested by the Solicitor General, with whom we generally agree. He proposes that defendants be required to show "that the requested modification is suitably tailored to adapt the decree to pertinent changes in circumstances, and is in keeping with the essential purposes of the decree," while not depriving the other party "of the benefit of its bargain." Brief for the United States as *Amicus Curiae* at 29. The "less burdensome alternative" approach suggested by the *amici* state, county and

municipal government organizations also seeks to balance the contractual and judicial decree sides of consent decrees. Brief of International City Management Association, *et al.* as *Amici Curiae* at 11.

The Solicitor General has provided a usefully balanced discussion of the competing interests at stake. The test he ultimately suggests, however, while it rests upon the four-part framework, gives almost unbridled scope to judicial discretion. The Solicitor General's test would allow modifications that are "suitably tailored," in response to "pertinent" changes in circumstances, if they are in keeping with the "essential" purposes of the decree, but the court would be left with little guidance as to what adjectives such as "suitable," "pertinent," and "essential" mean in the individual case. Brief of the United States as *Amicus Curiae* at 29.

This case presents the Court with an opportunity to refine the four-part test and to make the test a useful guide to the lower courts. The Court should make clear that the moving party bears the burden of demonstrating the need for modification, and that the moving party accordingly bears the burden of persuasion as to each of the four commonly applied factors. We submit that the following discussion of the substantive content and logical workings of the four-part modification standard may help in making the test a more uniform and principled one.

III. THE COURTS SHOULD APPLY A FOUR-STEP ANALYSIS THAT TAKES INTO ACCOUNT THE SPECIAL FEATURES OF INSTITUTIONAL CONSENT DECREES

A. To Support a Modification, the Moving Party Should Show That Compliance Is Not Possible Due to Changed Circumstances and That It Did Not Assume the Risk of Such Changed Circumstances Under the Consent Decree

The Court in *Swift* stated what ought to be true of the modification of any consent decree, whether involving institutional reform litigation or otherwise: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The [decree], whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *Swift*, 286 U.S. at 119. Consistent with this principle, the party seeking modification must demonstrate that circumstances have changed since the entry of the decree. If the moving party seeks merely to evade duties that were imposed to remedy conditions that existed at the time of the entry of the decree and that have not changed substantially in the interim, then the court may properly conclude that the moving party is seeking "to reverse under the guise of readjusting," and deny the request for modification. *Id.*

Even if the moving party shows that conditions have changed since the entry of the decree, the court should still inquire whether the moving party nonetheless ought in fairness to bear the burden of such changed conditions. Where a consent decree contains a population-limiting provision, for example, the courts have generally held quite properly that *foreseeable* increases in population do not constitute good cause to increase a consent decree's population limit. See *Ruiz*, 811 F.2d at 862-63 (modification request to use temporary facilities that did not meet consent decree standards rejected because defendants could foresee increased prison

population at time of entry into decree); *Twelve John Does II*, 861 F.2d at 297 (upholding district court denial of modification based on prison overcrowding which had been anticipated).

But the converse is not necessarily true: unanticipated population increases ought not to be a reason for a permanent relaxation of a decree's population requirements, although some courts have erred in so holding. See, e.g., *Plyler*, 846 F.2d at 212 (granting permanent modification). Absent a consent decree provision to the contrary, a court ought not to presume that plaintiff inmates have agreed to undertake the burden of greater crowding if the number of incarcerated persons increases unexpectedly. Instead, the governmental defendant ought normally to be deemed to have undertaken to provide the conditions agreed upon at the institution in question, and to take whatever additional measures are necessary to accommodate increases in the inmate population. That was apparently the assumption of the parties in this case when they increased the population limit in their consent decree in recognition of the fact that the Sheriff's initial population projections had been low. Pet. App. 7a-8a; 90-954 Pet. 5.

Of course, the governmental defendant's ability to increase correctional capacity in step with the increasing population may be affected by *unexpected* population increases. But the difficulties that such unexpected increases cause should not be a reason for *permanently* shifting the burden of increased crowding onto the plaintiff inmates -- such increases would justify at most a temporary relaxation of the decree's requirements sufficient to permit defendants to take the necessary measures to accommodate the increased population.

Other changed conditions may support a permanent change in the terms of the consent decree. For instance, a change the nature of the prison population may affect the appropriate population lid: A maximum security population may require a lower ceiling, especially in a case like this one, where adequate security for double-celled inmates cannot be provided by the staff because of the design of the prison. See 90-954; 90-1004 Resp. 9. ("The cells have doors, not bars, with a narrow window. The door was designed to maximize the detainee's privacy [t]he window provides a wide field of vision from the outside *only* if the observer is immediately adjacent to the door.") (citations omitted). However, if a minimum security population, perhaps consisting of older inmates or misdemeanants, were moved into the same prison, such changed circumstances might justify housing more prisoners in the same space. See generally, *Twelve John Does II*, 861 F.2d at 299 (discussing options for the District of Columbia to rearrange the use of space in the prison system to comply with consent decree).

B. The Moving Party Should Have the Burden Of Showing That the Change Is Necessary To Achieve, and Is Consistent With, the Original Purposes of the Consent Decree

1. The Consent Decree Should Be the Starting Point in Examining the Purposes of the Decree.

When a court considers a request for modification, it should start by examining the essential purposes of the consent decree. See *Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988) ("Badgley IV") (defendants have the burden of proof when seeking to modify a consent decree and must show

that modification will not impede compliance with the essential purposes of the decree). A consent decree reflects the balance struck by the parties in exchange for avoiding or terminating litigation. See *International Ass'n of Fire-Fighters v. Cleveland*, 478 U.S. 501, 528 (1986) ("A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating."); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) (entry into consent decrees is motivated by threatened or pending litigation); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

Allowing defendants to disrupt this balance too easily would discourage plaintiffs from entering into consent decrees. As the Solicitor General has stated, "[a] standard that allows uncontested modifications too freely may inhibit litigants from entering into consent decrees in the first instance." Brief for the United States as *Amicus Curiae* at 11.

Courts should assess the original purposes of the decree based on a practical interpretation of the consent decree itself. The consent decree particularizes the general constitutional issues raised in the original complaint. "[T]he resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve [T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy one of the parties to it." *United States v. Armour & Co.*, 402 U.S. at 681. As the Solicitor General suggests, the party opposing modification should not be

deprived "of the benefit of its bargain." Brief for the United States as *Amicus Curiae* at 29. The test Petitioner Rufo suggests -- to define the purposes of the consent decree as coterminous with external constitutional, statutory or regulatory requirements, (see Brief of Petitioner Rufo at 32) -- ignores this Court's recognition that consent decrees embody the agreement of the parties.

The interests of the inmates in this case should not be articulated as an abstract interest in obtaining constitutional prison conditions. Instead, the extent to which specific goals for addressing problems identified in the consent decree are met should be the standard measured in addressing the interests of the inmates. At the same time, a court analyzing a modification request should look to the *practical* purposes of the consent decree and allow a consistent modification, rather than assuming that all standards set in the decree should remain unchanged over time. For instance, the somewhat circular suggestion by the court in *Ruiz* that the primary purpose of the decree was to reduce overcrowding "through use of facilities meeting agreed-upon standards," may have lacked the necessary flexibility. See *Ruiz*, 811 F.2d at 862. Courts should have the discretion to modify even explicit consent decree provisions in order to achieve the underlying practical purposes of the decree.

2. The Modification of One Provision Should Be Favored If It Would Assist in Achieving a Paramount Practical Objective of the Decree.

The reviewing court should be more willing to grant a modification if the moving party shows that postponing or altering an aspect of the consent decree would achieve another more important objective of the decree. In *Carey*, the Second

Circuit found that only by modifying the consent decree to allow the placement of mentally retarded children in fifty-bed facilities, rather than the fifteen- or six-bed facilities required by the decree, could the defendants achieve the paramount purpose: relocation of 2,368 residents residing in large institutions. The court found that the modification in the number of beds allowed in each facility would achieve the more important goal of relocating the residents within a reasonable time period. *Carey*, 706 F.2d at 971. Courts reviewing requests for modification in the prison context have also balanced consent decree objectives. See, e.g., *Badgley IV*, 853 F.2d at 51-52 (allowing population increase in dormitory if the additional beds were used to secure compliance with consent decree provisions against double-celling and use of cots); see also *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987) (denying modification request as inconsistent with overall purposes of consent decree).

In addition to the prior instances of modification and refusals to modify the Lorton decree discussed above at pages 9-11, we have on numerous occasions agreed to modifications that were consistent with the original purposes of the decree. We agreed to a temporary 10 percent increase in the population limit during 1985 and 1986 to permit defendants to remove inmates from and renovate certain cellblocks elsewhere at Lorton, provided that the number of officers assigned to the Central Facility was increased during the period of the temporary increase. We have modified the consent decree's procedures for environmental and safety inspections when the originally-agreed procedures proved to be cumbersome and needlessly bureaucratic. We are in the process of modifying the health-care staffing requirements because experience has shown that better care can be delivered by a more highly qualified but smaller staff.

We have not, however, agreed to perpetual modification of the Lorton Central consent decree population limit, without promise of other improvements, in response to mere allegations of unanticipated increases in the prison population. The district court ruling upholding our refusal was sustained on appeal. *Twelve John Does II*, 861 F.2d at 298.

A permanent relaxation of the population lid without any compensating measures, such as the one in *Plyler*, and the one requested by Sheriff Rufo in the district court case below, should be granted only in unusual circumstances. See *Badgley IV*, 853 F.2d at 54 ("Where, as here, a consent decree aims to achieve precise objectives at a single location, modification of essential provisions ought to be disfavored until those seeking change demonstrate that they are in substantial compliance with the decree and that the proposed change will have no adverse effect on future compliance."); *Ruiz*, 811 F.2d at 862-63 (upholding district court refusal to alter population lid even temporarily because modification would not serve consent decree's overall purpose).

C. A Court Assessing Good Faith Efforts To Comply Should Examine the Reasons for Noncompliance and Defendants' Efforts To Explore Feasible Alternatives to Modification

Courts of appeals disagree about what factors should be taken into account in assessing the good faith factor in the modification test. We believe that the burden on the moving party should include demonstrating the absence of feasible alternatives. The experience of the Lorton inmates in the District of Columbia has been that, when prompted by the court to do so, the corrections officials have managed to come up with feasible alternatives. Despite defendants' threats in

the Lorton Central litigation that enforcement of the decree would cause a closure of the jails and the release of newly arrested suspects, the District of Columbia defendants have developed a number of alternatives to uncontrolled inmate releases. They have implemented an electronic house-arrest program for approximately 200 inmates. They are building new facilities that will provide drug treatment as well as incarceration. They have increased the amount of halfway house space, implemented a good time credits act, and increased funding for drug and employment programs designed to reduce recidivism. They have established a bond-reduction program that has resulted in the release of indigent pre-trial jail inmates being held in default of low bond amounts. They have rented prison space in other jurisdictions (a fairly costly stopgap arrangement which is gradually being phased out).

The District has also implemented an emergency release statute that has succeeded, with the application of minimal criteria, in releasing inmates who have a much lower recidivism rate than inmates who are released through conventional parole. Defendants' own statistics showed that inmates released through the early-release mechanism had a significantly lower recidivism rate (approximately 20 percent) than did inmates who were released through the conventional parole processes (approximately 50 percent). There is no evidence that enforcing the Lorton Central decree in the District of Columbia has resulted in the release of dangerous inmates. Instead, prison officials and the city government have introduced innovative and successful programs to maintain the prison population at the limit set in the consent decree.

In the rare case where no such alternatives are available, or the alternatives are inadequate to deal with a demonstrable threat of harm to the public, the modification granted should be a temporary one. For instance, in *Duran*, the court granted a modification for seven weeks until new prison spaces became available. *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985) ("*Duran II*").

The defendants should not be allowed to escape the consequences of a consent decree by claiming that other public officials appropriated inadequate funds or otherwise thwarted compliance. As Judge Mikva wrote when District of Columbia prison officials claimed that other District government officials were preventing consent decree compliance, "Counsel would have this court accept some kind of schism between the District government and the District's prison system [p]atently, the District government is viewed as an entity in this court, and its *inter se* problems cannot excuse the District's legal commitments." *Twelve John Does II*, 861 F.2d at 299-300. The district court in this case faced a situation in which the defendants claimed that they had to release inmates because of overcrowding. The district court found that the releases were the result of the defendants' failure to appropriate enough money to house the inmates, and rejected the Sheriff's request for modification. Pet. App. 13a. See also Brief of International City Management Assoc., *et al.* as *Amici Curiae*, at 12 ("The mere fact that compliance with a decree is more expensive than contemplated, or that state or local revenues are lower than in the past, would not in our view ordinarily constitute the type of burden that would, without more, warrant modification of the decree.").

If, however, a court were confronted by defendants who had enough money appropriated to house the incarcerated

inmates, but were simply unable to house the inmates due to a temporary condition, a short-term modification of the consent decree might be appropriate. Temporary inability to comply with the terms of the consent decree might arise in situations such as damage to a prison from a fire or flood, which could force prison officials to move inmates to another prison where they would have to be double-celled. Timing problems, such as those faced by the defendants in *Duran II*, may also be an adequate basis for temporary modification. See *Duran II*, 760 F.2d at 758 (allowing seven week modification permitting double-celling until renovations and a new building would add 738 new beds in the jail).

D. If the Other Elements Of the Test Are Not Met, Only Temporary Modifications Should Be Permitted, and Even Then Only If the Moving Party Shows That Enforcement Would Demonstrably Harm the Public Welfare

The allegation that enforcing a prison population lid harms the public interest has been made many times in the District of Columbia, as well as by the petitioners in this case. See *Twelve John Does II*, 861 F.2d 295, 297 (D.C. Cir. 1988) ("The District contends that . . . forced compliance [with the terms of the consent decree] would imperil the public interest by requiring release of prisoners."); Brief for Petitioner Robert C. Rufo at 38-40. Such allegations, unless supported by specific evidence of harm to the public, do not justify a consent decree modification.

Defendants frequently play on the fear of the courts and the public that dangerous criminals will be let out into the streets if defendants' promises are enforced. See *Plyler*, 846

F.2d at 213 ("compelling the State to achieve compliance through the early release of massive numbers of inmates would create substantial dangers"); *Duran II*, 760 F.2d at 757-63 (allowing double-celling after consideration of public interest); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc) (same). See also Brief of United States as *Amicus Curiae* at 24.

As recounted above, our experience in enforcing the Lorton Central consent decree indicates that threats to the public interest may often be exaggerated for the purposes of litigation. In 1988, the United States Court of Appeals for the District of Columbia Circuit upheld the district court denial of defendants' requests for a modification of the Central Facility's population lid, despite defendants' nonspecific threats of danger to the public. See *Twelve John Does II*, 861 F.2d at 302 (affirming refusal to modify consent decree on the mere basis of an increase in the number of prisoners resulting from increased drug convictions and defendants' unsupported allegations of public danger); *Twelve John Does v. District of Columbia*, 855 F.2d 874, 877 (D.C. Cir. 1988) ("*Twelve John Does I*") (denying modification request based on foreseeable overcrowding). When forced to comply with its obligations, the District of Columbia has responded with a number of innovative programs which lowered the number of inmates to meet the prison population lid, while at the same time not increasing the threat to the public. See *supra* p. 22.

We do not contend that enforcement of a consent decree will never harm the public interest. In certain cases, it may be appropriate to modify a consent decree to meet a demonstrable threat to the public interest. For instance, in *Duran II*, defendants appear to have presented a credible showing of public harm. The Seventh Circuit found that a

significant percentage of released detainees became fugitives or committed serious felonies when released. Under these circumstances, the court allowed double-celling for a seven week period. *Duran II*, 760 F.2d at 760-61, 763.

In the case under review, defendants have made no well-supported showing of a threat to the public from the release of prisoners or other methods of compliance with the consent decree. The district court should only consider modifying the consent decree if the Sheriff demonstrates a quantifiable threat adequate to support such a finding.

IV. THE APPLICATION OF OUR SUGGESTED TEST TO THE DECISION OF THE DISTRICT COURT

If this Court elaborates the four-part standard as we have recommended above, the district courts will have a set of principles on the basis of which they can make fuller findings of fact. The district court here lacked such a statement of principles, and accordingly its findings are not as complete as might be expected in the future. Nonetheless, we believe that the district court's opinion is amply supportable under our proposed standard and ought to be affirmed. The Sheriff did not demonstrate that the current situation met the three principal elements of the flexible modification standard. Nor did he show that a demonstrable threat to the public welfare justified modification in spite of his failure to meet his burden of persuasion as to the other three elements.

The Sheriff's argument, that the increase in the pretrial detainee population since the entry of the consent decree was an unforeseen change in circumstances justifying modification, Pet. App. 10a, did not satisfy his burden under the proposed standard. This failure to show changed circumstances

provides a sufficient ground to uphold the district court decision. The district court found that there had been a steady increase in the inmate population since 1985. Since the trend was apparent, it did not warrant a modification even if the increase was beyond the control of the Sheriff. Pet. App. 11a. There is no indication that the plaintiff inmates assumed the risk of such increases under the consent decree. The Sheriff made no effort to show either that the requested modification would be temporary while he searched for other solutions to the growing population of pretrial detainees, or that he had any plans to attempt to meet the consent decree goals at a later date.

The Sheriff also failed to show that the proposed modification was consistent with the practical purposes of the consent decree. Pet. App. 12a. Instead, he suggested that the alleged compliance of the proposed modification with constitutional standards was an adequate basis to support modification. The district court sensibly rejected this analysis because it would undermine the value of consent decrees as negotiated agreements between the parties. Pet. App. 12a. In holding that the purposes of the decree required enforcement of the single-celling requirement, the court did not merely equate the provisions of the decree with its purposes. The record shows that double-celling in cells that were intentionally designed to provide privacy for their solitary occupants, absent some physical modification to those cells, would pose grave security risks. 90-954; 90-1004 Resp. 9.

Although the district court did not explicitly examine the good faith efforts of the Sheriff to comply with the consent decree, it effectively considered this prong of the proposed standard and found that the Sheriff had failed to meet his burden of persuasion. Pet. App. 13a. In response to the

Sheriff's argument that some pretrial detainees might be released if the modification was not granted, the district court pointed out that such a release would not justify a modification, but would only indicate that public officials had failed to provide the Sheriff with adequate resources to allow compliance. Pet. App. 13a.

Since the Sheriff failed to carry his burden as to these three elements of the modification standard, the district court's decision denying modification was proper absent a showing that enforcement of the decree could pose a demonstrable threat to the public welfare. Although the Sheriff claimed that failure to grant the proposed modification might result in the release of some pretrial detainees, the district court rejected such a basis for modification. Pet. App. 13a. The Sheriff failed to show the particular nature of the threat and the absence of alternatives, and he did not seek a temporary modification, but rather a permanent one. The district court thus properly denied modification.

CONCLUSION

The Court should affirm the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Peter J. Nickles

Bruce N. Kuhlik

*Alan A. Pemberton

Michele J. Woods

Covington & Burling

1201 Pennsylvania Avenue, N.W.

P.O. Box 7566

Washington, D.C. 20044

(202) 662-6000

*Counsel of Record

MAY 31 1991

Nos. 90-954, 90-1004

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, *et al.*,

Petitioners,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,

Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,

Petitioner,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE
CIVIL LIBERTIES UNION OF MASSACHUSETTS IN
SUPPORT OF RESPONDENTS.

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALEXA P. FREEMAN
ALVIN J. BRONSTEIN
NATIONAL PRISON PROJECT
OF THE AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., NW
Washington, DC 20009
(202) 234-4830

JOHN A. POWELL
STEVEN R. SHAPIRO
ACLU
132 West 43 Street
New York, NY 10036

JOHN REINSTEIN
CIVIL LIBERTIES
UNION OF MASS.
19 Temple Place
Boston, MA 02111

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
INTEREST OF AMICI.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	8
I. PARTIES MAY AGREE TO, AND COURTS MAY ENFORCE, RELIEF IN A CONSENT DECREE THAT GOES BEYOND THE REQUIREMENTS OF FEDERAL LAW.....	8
A. <u>Local No. 93</u> Authoritatively Rejects the Argument that the Relief Granted in a Consent Decree Is Limited to the Relief that a Federal Court Could Have Granted After Trial.....	8
B. A Federal Court Is Not Required to Modify a Consent Decree Simply Be- cause It May Exceed Constitutional Minima.....	11
C. Adoption of the <u>Carey</u> Standard Does Not Imply That Consent Decrees Must Be Modified Simply Because the	

Relief Provided Goes Beyond Consti- tutional Minima.....	15
--	----

II. THERE HAS BEEN NO INTERVEN- ING CHANGE IN THE LAW JUSTIFYING MODIFICATION.....	19
--	----

III. IN DETERMINING WHETHER TO MODIFY CONSENT DECREES, A FEDERAL COURT SHOULD BE GUIDED BY THE CENTRAL REMEDIAL PURPOSES OF THE DECREE.....	22
--	----

A. There Are Enormous Practical Difficul- ties in Petition- ers' Position That the Sole Relevant Criterion Is Whether Granting the Modification Would Violate the Constitution.....	22
--	----

B. The Trial Court Should Be Guided by the Remedial Purposes of the Consent Decree in Determining Whether to Grant Modifica- tion.....	33
---	----

IV. IMPORTANT INTERESTS ARE SERVED BY ALLOWING STATES AND LOCALITIES TO SETTLE LAWSUITS.....	39
---	----

A. The Modification Standard Advocated by Petitioners Would Make	
---	--

	Settlement Less Attractive to Both Plaintiffs and Defendants.....	39
B.	Allowing Defendants Easy Modification of Consent Decrees Has the Perverse Effect of Undermin- ing Defendants' Ability to Enter into Consent Decrees.....	42
C.	Considerations of Finality, Efficien- cy, and Federalism Require Stability in Consent Decrees.....	45
	CONCLUSION.....	53

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Ackermann v. United States, 340 U.S. 193 (1950).....	45
Alberti v. Heard, 600 F.Supp. 443 (S.D.Tex. 1984), aff'd sub nom. Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986).....	29
Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (en banc).....	44
Bell v. Wolfish, 441 U.S. 520 (1979).....	19, 20, 26, 27
Board of Education of Oklahoma City Public Schools v. Dowell, 111 S.Ct. 630 (1991).....	13, 14
Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977).....	14
DeShaney v. Winnebago County DSS, 109 S.Ct. 998 (1989).....	14
Evans v. Jeff D., 475 U.S. 717 (1986).....	44
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).....	11
Fisher v. Koehler, 692 F.Supp. 1519 (S.D.N.Y. 1988).....	29

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).....	29
Gilmore v. City of Montgomery, 417 U.S. 556 (1974).....	25
Hutto v. Finney, 437 U.S. 678 (1978).....	24, 42
Inmates of Suffolk County Jail v. Kearney, 734 F.Supp. 561 (D.Mass. 1990).....	15, 20
Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989).....	35, 36
Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986).....	passim
Martin v. White, 742 F.2d 469 (8th Cir. 1984).....	29
Milliken v. Bradley, 418 U.S. 717 (1974).....	14
Milliken v. Bradley, 433 U.S. 267 (1977).....	25
Moore v. National Association of Securities Dealers, 762 F.2d 1093 (D.C.Cir. 1985).....	44
Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc).....	18
Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).....	17
New York State Association for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983).....	passim

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).....	12, 13
Plyler v. Evatt, 846 F.2d 208 (4th Cir. 1988), cert. denied, 488 U.S. 897 (1988).....	18
Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991).....	17, 18
Pugh v. Locke, 406 F.Supp. 318 (M.D.Ala. 1976), aff'd as modified, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds, 438 U.S. 781 (1978) (per curiam).....	29
Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).....	28
Rhodes v. Chapman, 452 U.S. 337 (1981).....	14, 27, 28, 42
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).....	14
Swift & Co. v. United States, 276 U.S. 311 (1928).....	21
System Federation No. 91 v. Wright, 364 U.S. 642 (1961).....	11, 12
United States v. Swift & Co., 286 U.S. 106 (1932).....	15, 19
United States v. Ward Baking Co., 376 U.S. 327 (1964).....	50

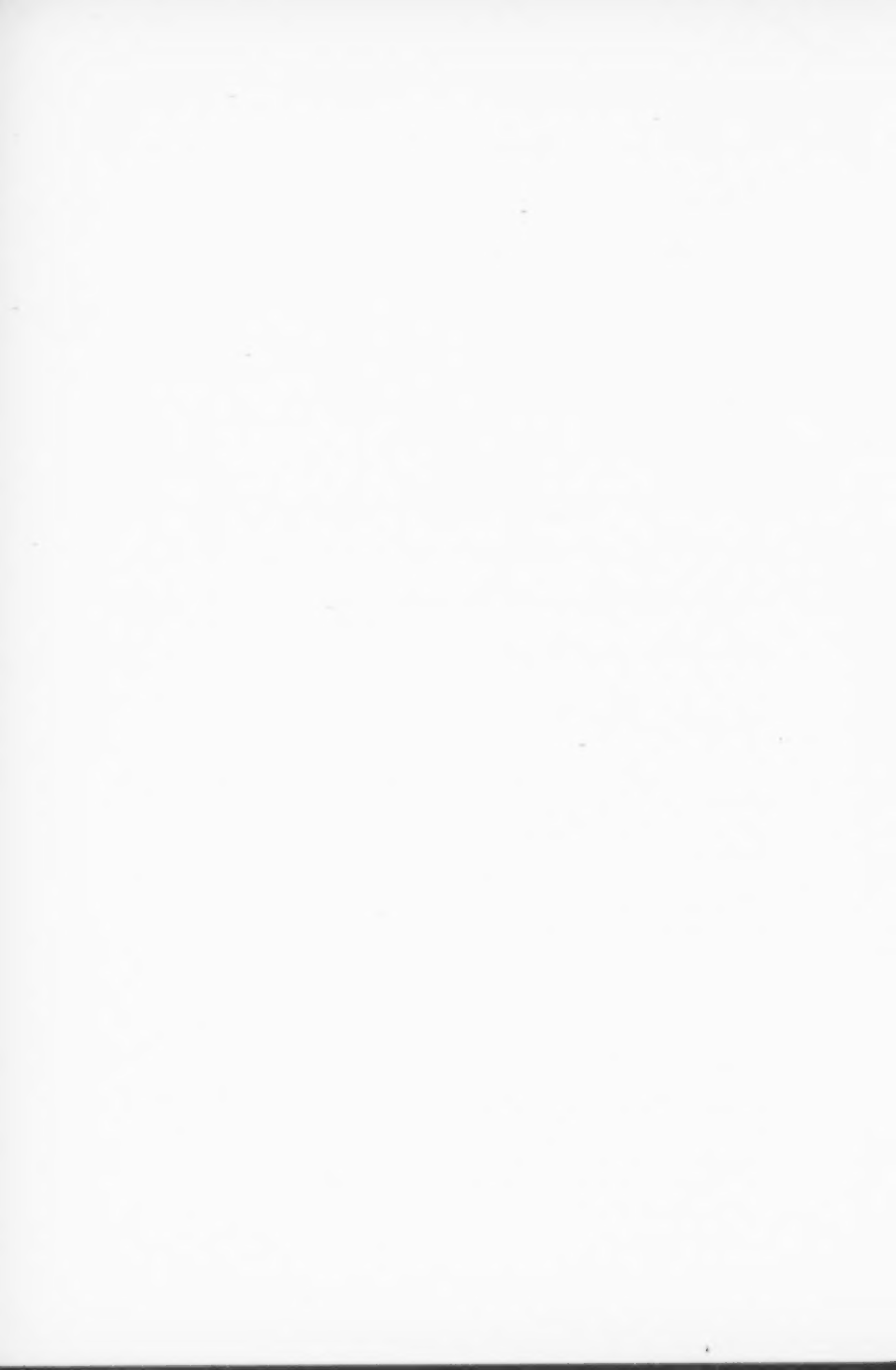
Washington v. Penwell, 700 F.2d 570 (9th Cir. 1983).....	51, 52
Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).....	29
Youngberg v. Romeo, 457 U.S. 307 (1982).....	16
Younger v. Harris, 401 U.S. 37 (1971).....	52

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amendment Eight.....	24
U.S. Const. Amendment Fourteen.....	9
42 U.S.C. §1983.....	9

OTHER AUTHORITIES

Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101 (1986).....	47, 48, 50
Posner & Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Stud. 83 (1977).....	47
J. Rawls, A Theory of Justice (1971).....	43
Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887 (1984).....	43



INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of nearly 300,000 members. The ACLU is dedicated to preserving and protecting the Bill of Rights. The Civil Liberties Union of Massachusetts is one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of prisoners. The ACLU and the National Prison Project have entered into a number of consent decrees in prison and jail cases, and thus have a particular interest in the standard to be applied to motions to modify consent decrees. The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF THE CASE

The amici adopt respondents' statement of the case as their own.

SUMMARY OF ARGUMENT

The basic premise of the petitioners' argument is that they are entitled to modification of the consent decree because the agreement to forego double celling in the Suffolk County Jail went beyond the relief that the Constitution would have required by its own force. Petitioners' argument, however, is fatally flawed because this Court's decision in Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986), permits a court to enter a consent decree that goes beyond constitutional minima.

If a federal court has jurisdiction to enter a consent decree that may go beyond constitutional minima, there can be no jurisdictional bar to enforcement of the consent decree as written, and governmental

defendants are not automatically entitled to modification simply because a consent decree now appears to provide more relief than required under the Constitution. Contrary to petitioners' argument, this Court has never held that a change in decisional law by itself justifies modification of a consent decree, unless the change produces an affirmative conflict with the legal basis of the consent decree.¹

Petitioners purport to embrace the standard for modification of institutional consent decrees set forth in New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). The standard utilized by the Carey court, however, did not require modification of a consent decree simply because it went beyond the requirements of

¹ Although a change in decisional law does not require automatic modification, it may be a relevant factor in considering equitable modification. See p.4, infra.

the Constitution. Rather, the Carey court appropriately looked to the central remedial purposes of the consent decree in considering a motion to modify. The trial court here correctly applied the Carey standard and, based on the remedial purposes of this decree, denied modification.

Amici acknowledge that, under Carey, a change in the law may be relevant to equitable modification, even if modification is not automatically required. In this case, however, there has been no change in the controlling law. Both before and after the consent decree in this case, whether or not the double celling of pretrial detainees violated the law turned on the factual circumstances of the individual case. By signing the consent decree, the petitioners waived any challenge to the existence of factual circumstances justifying a ban on double celling.

Enormous practical difficulties would accompany adoption of the petitioners' contention that a modification must be granted at the request of the government unless conditions resulting from the modification would affirmatively violate the Constitution. Each request for modification would be likely to require a full retrial of the case, since whether or not conditions in a jail violate the Constitution necessarily turns on the interaction of a number of conditions. Moreover, adoption of petitioners' standard would require courts to make predictive judgments as to whether the conditions resulting from the modification would violate the Constitution. The facts in this case, in which the jail was designed specifically for single celling, and staff cannot effectively monitor activity in the cells on a continual basis, well illustrate the pitfalls of attempting to make such a prediction. Because the issue is one

of equity, the trial court should have the discretion to deny a modification that has the potential to cause serious violence, even if the trial court cannot make a judgment that the level of violence resulting from the modification would necessarily violate the Constitution.

Accordingly, the trial court should be guided by the central remedial purposes of the parties in considering a motion to modify. This is in fact the standard applied in Carey, which petitioners purport to embrace. The trial court correctly applied the Carey standard in this case, and denied modification because granting it would have destroyed a central element of the parties' bargain, the agreement to single cell the jail.

The modification standard advocated by petitioners goes well beyond Carey and would greatly discourage settlement of institutional litigation. However much all

parties wished to settle a case, they would be unable to enter into a consent decree with any assurance that it would be enforced. Those consent decrees that were entered would be subject to repeated motions for modification, further crowding the dockets of the federal courts. Petitioners' modification standard would disrupt freely negotiated agreements that maximize the gain of all parties, and remove incentives for correctional officials to comply with such agreements. Finally, such a standard would be fundamentally incompatible with basic principles of federalism, which require that states and localities be free to enter into binding agreements that they believe to be in their interest.

ARGUMENT

I. PARTIES MAY AGREE TO, AND COURTS MAY ENFORCE, RELIEF IN A CONSENT DECREE THAT GOES BEYOND THE REQUIREMENTS OF FEDERAL LAW

- A. Local No. 93 Authoritatively Rejects the Argument that the Relief Granted in a Consent Decree Is Limited to the Relief That a Federal Court Could Have Granted After Trial

At the heart of petitioners' argument is the claim that governmental agencies are entitled to modification of prison and jail consent decrees unless granting the modification would result in conditions that affirmatively violate the Constitution. See Rufo Brief at 23-24; see also Rapone Brief at 30. A necessary corollary of petitioners' argument is that a trial court is barred from entering a consent decree that incorporates relief beyond that required under the Constitution. For the reasons given below, this argument fails. A court may enter a consent decree that provides relief consistent with the Constitution, even if

some aspects of the decree may not be independently required by the Constitution. It follows that a court of equity is not required to undertake a de novo determination of whether every feature of a remedial plan is independently required by the Constitution whenever a defendant seeks modification.

Neither 42 U.S.C. §1983 nor the Fourteenth Amendment bars a federal court from entering a consent decree in which state or local officials agree to a remedy for a constitutional violation that is different from the remedy that a federal court might order after trial if the case were litigated:

[A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must "com[e] within the general scope of the case made by the pleadings," and must further the objectives of the law upon which the complaint was based. However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. Therefore, a federal court is not necessarily barred from entering a consent decree merely

because the decree provides broader relief than the court could have awarded after a trial.

Local Number 93 v. City of Cleveland, 478 U.S. 501, 525 (1986) (citations omitted). See also Local 93 at 522: "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree."

Petitioners argue that Local No. 93 applies only to entry of a consent decree, not to the modification of a consent decree. Rufo Brief at 25; Rapone Brief at 44. It is true that the Court in Local No. 93 distinguished between the entry of a decree and certain modifications of a consent decree. That discussion, however, distinguished the entry of consent decrees from attempts to modify a consent decree to provide greater relief than the parties originally agreed to, over the objection of a defendant. Id. at 528. Local No. 93

acknowledges that under Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), a court in a Title VII case cannot modify an injunction over a defendant's objections in order to provide greater relief than the court could order following trial. Local No. 93, 478 U.S. at 527-28. This is a completely different issue from the enforceability of a consent decree as written.

B. A Federal Court Is Not Required to Modify a Consent Decree Simply Because It May Exceed Constitutional Minima

If a federal court has jurisdiction to enter a consent decree that goes beyond constitutional minima, there can be no jurisdictional bar to enforcement of the consent decree as written, and defendants are not automatically entitled to modification.

The petitioners rely primarily on System Federation No. 91 v. Wright, 364 U.S. 642 (1961), and Pasadena City Board of

Education v. Spangler, 427 U.S. 424 (1976), to support their argument that a federal court must release a state from obligations it agreed to in settlement negotiations if those obligations go beyond what federal law requires (Rufo Brief at 23-26; Rapone Brief at 34-35). Neither case applies to the facts here.

System Federation involved a consent decree that had come into direct conflict with the statute on which it was based, the Railway Labor Act. This Court decided that, in view of an amendment to the Act subsequent to the entry of the consent decree, the trial court abused its discretion by refusing to modify the decree. System Federation, 364 U.S. at 651-53. See also Local No. 93, 478 U.S. at 526-527. System Federation does not establish a blanket rule that all subsequent changes in the law require modification.

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), similarly does

not establish a principle that every intervening development in the law requires a court to modify a consent decree. In Spangler, this Court considered the developments in the law in light of the particular circumstances of that case:

The ambiguity of the [challenged] provision itself, and the fact that the parties to the decree interpreted it in a manner contrary to the interpretation ultimately placed upon it by the District Court, is an added factor in support of modification. The two factors taken together make a sufficiently compelling case so that such modification should have been ordered by the District Court. System Federation v. Wright, supra.

Id. at 438. By contrast, in the present case there is no suggestion that the single celling provision petitioners seek to modify is in any way ambiguous.²

² Similarly, Board of Educ. of Oklahoma City P. Sch. v. Dowell, 111 S.Ct. 630 (1991), does not support petitioners' argument. First, there is a fundamental distinction between school desegregation cases and prison and jail cases. School systems have an obligation not to impose racial segregation, but they have no affirmative obligation to reverse racial segregation not resulting from governmental

acts. See, e.g., Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977). Prison and jail officials, in contrast, have an affirmative obligation to provide the basic necessities required under the Eighth Amendment and the Due Process Clause to convicted prisoners and pretrial detainees. See, e.g., DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005-1006 (1989) and Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Accordingly, a one-time achievement of constitutionality in a prison or jail case does not give the same assurance of continued constitutionality as does achievement of a unitary school system. Second, even in the context of school desegregation, Dowell does not hold that momentary achievement of constitutional standards entitles a governmental entity to relief. Rather, the standard in Dowell is whether the school board has demonstrated that it "had complied in good faith with the desegregation decree since it was entered and whether the vestiges of past discrimination had been eliminated to the extent practicable." 111 S.Ct. at 638.

Petitioners also cite language from Milliken v. Bradley, 418 U.S. 717 (1974), and Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), regarding limitations on the scope of federal remedial relief in litigated cases. Under the analysis in Local No. 93, such limitations do not apply to cases that result in consent decrees.

- C. Adoption of the Carey Standard³ Does Not Imply That Consent Decrees Must Be Modified Simply Because the Relief Provided Goes Beyond Constitutional Minima

Although the petitioners purport to rely on New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.

³ The trial court denied the petitioners' motion for modification under both the standard in United States v. Swift & Co., 286 U.S. 106, 119 (1932) ("Swift II"), and the standard in New York State Association for Retarded Children, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983), cert. denied, 464 U.S. 915 (1983). Inmates of Suffolk County Jail v. Kearney, 734 F.Supp. 561, 565 (D.Mass. 1990). Therefore, this brief addresses the propriety of the trial court's action only under the more liberal Carey standard, without necessarily endorsing every aspect of the Carey holding.

Though less exacting than the Swift test for modification, the Carey standard is far from toothless. See Section III, infra. Because petitioners seek a standard requiring modification unless the modification would affirmatively violate the Constitution, petitioners seek a standard substantially more liberal than that set forth in Carey. Thus, the argument of amicus State of New York—that plaintiffs in institutional cases have continued to enter into consent decrees under the Carey standard—is irrelevant to the argument made by petitioners.

1983), cert. denied, 464 U.S. 915 (1983), petitioners ignore the fact that Carey itself did not propose a standard that required modification of all relief going beyond constitutional requirements.⁴ Rather, the court looked at the central purpose of the

⁴ The Carey court did note that this Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), was a factor supporting defendants' request for modification, but it did not suggest that the Youngberg decision could justify a modification inconsistent with the central purpose of the decree; indeed, the court's language suggests the opposite:

Once the defendants had established, as they unquestionably did, that abandoning the 15/10 and 6/3 bed limitations in favor of a 50 bed limitation would facilitate the emptying of Willowbrook and like institutions, the question was whether...in Justice Powell's formulation, "the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." [Youngberg v. Romeo], 457 U.S. at 321.

Carey, 706 F.2d at 971. See also the language from Carey quoted at p.35, infra.

consent decree, which was to move the mentally retarded out of "such a mammoth institution as Willowbrook," and whether defendants' proposed modification would further that goal. Id. at 969. The Carey court concluded that modification would not disturb the central purpose of the decree; indeed, it was essential to achieving the primary objective of the decree. Id. Here, by contrast, the modification sought by petitioners would violate the very essence of the decree. See pp. 37-38, infra.

Petitioner Rufo cites decisions from six other appellate courts as supporting his position on modification. (Rufo Brief at 20). Of these decisions, only Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984), appears to endorse a standard requiring modifications down to constitutional minima. Indeed, the latest decision of the Fourth Circuit in Plyler v. Evatt, 924 F.2d 1321 (4th Cir. 1991) ("Plyler II"), extensively addresses

)

this issue and clarifies the court's earlier decisions, cited by petitioners, in Plyler v. Evatt, 846 F.2d 208 (4th Cir. 1988), cert. denied, 488 U.S. 897 (1988) ("Plyler I"), and Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc):

This was much too draconian a reading of Plyler I's holding on that point. As a moment's reflection will show, so to read that decision would necessarily imply that the only legally enforceable obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. For the practical effect would be that every effort by the plaintiff class to enforce specific provisions of the decree could be effectively countered by a motion by the state to modify so long as the modification did not generate unconstitutional conditions overall. Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action.

Plyler II, 924 F.2d at 1327. (Emphasis in original).

II. THERE HAS BEEN NO INTERVENING CHANGE
 IN THE LAW JUSTIFYING MODIFICATION

For the reasons given in Section I, even if this Court had held, subsequent to entry of the consent decree in this case, that double celling can never be unconstitutional, such a ruling would not have automatically entitled the petitioners to modification of the consent decree.⁵

In this case, however, no such changes in the law have occurred. This Court has never held, or implied that it would hold, that double celling is constitutional under all circumstances. Bell v. Wolfish, 441 U.S. 520

⁵ The Court may nonetheless decide that a change in the law, unanticipated by the parties, is a change in circumstances that may justify equitable modification. Both the Swift II and Carey standards recognize that certain changes in the law may justify equitable modification. The respondents propose that, in the event that the Court does not continue to apply the Swift II standard, the standard that the Court adopts include consideration of changed circumstances that were not anticipated by the parties. Changed circumstances in appropriate cases could include changes in decisional law.

(1979), reversed an order, entered after a trial on the merits, requiring single celling at a detention center. This Court engaged in a detailed, fact-based inquiry into the adequacy of conditions and found that under the particular circumstances of that case there was no constitutional violation. Bell did not change the principle that under certain conditions, double celling in a jail may constitute punishment in violation of the due process clause, and certainly did not render single celling inconsistent with federal law. Thus, the trial court correctly found that Bell did not directly overrule the law on which the consent decree was based. Inmates of Suffolk County Jail v. Kearney, 734 F.Supp. 561, 564 (D.Mass. 1990).

Accordingly, in a fundamental sense the law was the same before and after Bell: whether or not the double celling of pretrial detainees violates the Constitution depends on the particular factual circumstances. But

the essence of consent decrees is that the parties waive, now and in the future, the right to contest the facts. See Swift & Co. v. United States, 276 U.S. 311, 329 (1928) ("Swift I"):

Here again, the defendants ignore the fact that by consenting to the entry of the decree, "without any findings of fact," they left to the Court the power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified compelling the defendants to abandon all participation in these businesses, to divest themselves of their interest therein, and to abstain from acquiring any interest hereafter.

The petitioners do not dispute the fundamental rule that a federal court may enforce a consent decree whose provisions mandate appropriate remedies for all constitutional violations that would have been established if the plaintiffs had proven every factual claim they had alleged in the complaint. Here, the parties developed a remedy designed to cure the unconstitutional conditions in the old Suffolk County Jail.

The trial court was therefore justified in entering a remedy, chosen by the parties, to correct the constitutional violations.

III. IN DETERMINING WHETHER TO MODIFY CONSENT DECREES, A FEDERAL COURT SHOULD BE GUIDED BY THE CENTRAL REMEDIAL PURPOSES OF THE DECREE.

A. There Are Enormous Practical Difficulties in Petitioners' Position That the Sole Relevant Criterion Is Whether Granting the Modification Would Violate the Constitution.

Petitioners' position comes down to an argument that a consent decree should be modified at the request of governmental defendants unless the conditions resulting from the consent decree, as modified, would affirmatively violate the Constitution. For the reasons stated in Section I, supra, this position has been previously rejected by this Court.

Beyond the theoretical reasons for rejecting petitioners' position are the enormous practical difficulties that adoption of such a standard would entail. The

petitioners' contention would require trial courts to cut back any consent decree to the precise relief that would have been granted by the court after trial at that point in the litigation. Obviously, at least in prison and jail conditions cases, a defendant's request for modification would require trial of all existing conditions of confinement to determine whether the particular relief that defendants wanted to eliminate would tip the system from constitutional to unconstitutional. This is so because the Court has long recognized that prison and jail conditions do not exist in a vacuum; individual conditions that, considered by themselves, are not unconstitutional may nevertheless be remedied to address general conditions below constitutional minima:

Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards. Petitioners do not challenge this proposition; nor do they disagree with the District Court's original conclusion that conditions in Arkansas' prisons, including its

punitive isolation cells, constituted cruel and unusual punishment. Rather petitioners single out that portion of the District Court's most recent order that forbids the Department to sentence inmates to more than 30 days in punitive isolation.

* * *

The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.

* * *

The order is supported by the interdependence of the conditions producing the violation. The vandalized cells and the atmosphere of violence were attributable, in part, to overcrowding and to deep-seated enmities growing out of months of constant daily friction.... Like the Court of Appeals, we find no error in the inclusion of a 30-day limitation on sentences to punitive isolation as a part of the District Court's comprehensive remedy.

Hutto v. Finney, 437 U.S. 678, 685, 687-88 (1978).⁶

⁶ This principle also applies to remedial orders not involving the Eighth Amendment. Once a constitutional violation is established, remedial decrees may

Aside from the burden of multiple retrials that would be imposed on federal courts if the petitioners' argument were accepted, the standard would be enormously difficult to apply in prison and jail cases. This case provides an example of the difficulties that would attend such a standard. As respondents point out in their Statement of the Case, because the consent decree contemplated continued single celling in the jail, the parties agreed to a modification of the decree increasing the size of the jail, reducing the size of individual cells, and changing the traditional design of the cell fronts. In order to promote privacy, the parties agreed that, instead of the traditional bar-front

require actions not independently required by the Constitution if those actions are, in the judgment of the court, necessary to correct the constitutional deficiencies. Milliken v. Bradley, 433 U.S. 267 (1977) ("Milliken II"); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

cell, the cell front would be solid, with a small window that offers a correctional officer an opportunity to observe events in the cell only if the officer is standing close to the front of the cell. Obviously, this design means that, in the event of double celling, only for a small fraction of the time will activities in these cells be within sight of a staff member. In addition, because these are jail prisoners, the staff will be attempting to double cell prisoners whose classification is based on observing their behavior for a very limited time.⁷

The first problem in utilizing the petitioners' standard is that the trial court would be required to make a decision about the Constitution that is completely

⁷ While the prisoners are pretrial detainees, many pose serious security problems. Cf. Bell v. Wolfish, 441 U.S. 520, 533 (1979) (The presumption of innocence is irrelevant to the determination of the security measures that are appropriate to maintain safety in a jail).

predictive: would confining two persons accused of crimes, often violent crimes, for twelve hours a day, in seventy square feet of space when staff lacks continuous visual surveillance of the cell, produce an unconstitutional level of violence? In making its decision on this issue, the trial court would have no experience specific to the facility to guide it, because the facility was built, and has always been operated, as a single-celled facility.

While it is true that the trial court will know that many facilities are able to double cell without producing unconstitutional levels of violence,⁸ overcrowding in many other facilities, particularly those in which the staff is unable to supervise the prisoners adequately, has resulted in unconstitutional levels of violence. See

⁸ See Rhodes v. Chapman, 452 U.S. 337 (1981), and Bell v. Wolfish, 441 U.S. 520 (1979).

Rhodes v. Chapman, 452 U.S. 337, 352 n.17 (1981), citing with approval four cases in which the lower courts had issued relief against prison overcrowding. The first of these four cases was Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Among the findings cited by the court of appeals in affirming the trial court's conclusion that the prison had not offered reasonable protection from violence were the following:

The evidence indicates that the architecture of the cellhouses and the physical layout of buildings and other structures contribute to the violence and illegal activity between inmates. The architecture of cellhouses 1 and 7, which was designed for a less mobile prison population, does not provide adequate visibility for guards to properly monitor from secure vantage points inmate movement within the cellhouse. The internal structure of the cellhouses along with the random construction of the buildings, walls, and fences within the perimeter of the prison provide numerous "blind areas" where violence, threats, and other illegal activities can occur without detection by prison officials.

Id. at 573. (Citations omitted).

The other three cases cited in Rhodes similarly involved, among other issues, a combination of overcrowding and inadequate staff supervision. See Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977); Gates v. Collier, 501 F.2d 1291, 1308-1309 (5th Cir. 1974); and Pugh v. Locke, 406 F.Supp. 318, 329 (M.D.Ala. 1976), aff'd as modified, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds, 438 U.S. 781 (1978) (per curiam). Numerous other cases have found unconstitutional levels of violence in prisons and jails, based in part on the inability of staff to observe prisoner activities. See, e.g., Alberti v. Heard, 600 F.Supp. 443, 451-452 (S.D.Tex. 1984), aff'd sub nom. Alberti v. Klevenhagen, 790 F.2d 1220 (5th Cir. 1986); Martin v. White, 742 F.2d 469, 471 (8th Cir. 1984); and Fisher v. Koehler, 692 F.Supp. 1519, 1549 (S.D.N.Y. 1988).

In essence, the trial court would be asked to wager with the lives and safety of the prisoners that, even though the opportunity for violence would rise substantially if double celling were allowed, in this particular facility the total number of deaths and injuries resulting from the modification would not be high enough by itself to offend the Constitution. Obviously, for the trial court to predict that future levels of violence⁹ resulting

⁹ In an affidavit filed with the trial court, respondents' corrections expert explained in detail why the double celling will produce a significant risk of increased violence:

8. Because each cell is hermetically sealed, inmates locked in effectively cannot communicate with the officer who is likely to be at the control station. If there is a fight or any kind of problem, the inmate would have to signal from within by kicking the door, pounding the enclosed window in the door, or waving at the closed window. Yelling would probably not be heard. Thus, the safety of any double-celled inmate could not be insured. If an officer is to be aware of any problem, he would have to be very

close to the cell door rather than being able to view it from the control station. Safety of the inmates would require continuous viewing by an officer actually looking in the windows of the doors during the hours that detainees are locked in their cells.

* * *

12. Under the Sheriff's proposal, 400 men would be double bunked. I do not believe that any classification system would be effective in preventing the very real possibility of assaultive or sexually abusive behavior between two men double bunked in one of these cells. It is my opinion that double bunking 200 of the cells at the new Suffolk County Jail, despite the attempts at classification, will lead to a substantial likelihood of violent behavior. Pre-trial detainees are the most difficult individuals to keep in custody. They experience much greater tension than sentenced inmates. These tensions are a result of their unexpected arrest and incarceration, their inability to communicate with their family and friends, and their not knowing how long they will be held in custody, whether they can raise the money for bail, when they will be tried, what is happening to their families and their possessions or what the outcome of their trial will be. Frequently, there is very little in the way of background information available to the Sheriff with respect to the

from granting the modification will or will not rise significantly enough to violate the Constitution is a far more difficult judgment than the judgment that a certain set of existing conditions is or is not constitutional.

Moreover, for the reasons given in Section I, supra, there is no theoretical need for the trial court to try to predict whether the degree of suffering resulting

detainees. In addition, there is much greater turn over with pre-trial detainees which means that it is harder to assess a constantly changing population. At the Charles Street Jail according to the Sheriff's figures, fifty percent of the detainees are released within eight days. Each of these factors makes meaningful classification extremely difficult.

13. I believe that the combination of isolation, inability to communicate, and tension caused by having two inmates in a cell designed for one will produce serious problems for the safety of the inmates and ultimately for the Correctional officers and Sheriff's staff.

from the modification will be high enough by itself to violate the Constitution. Because the issue is one of equity rather than federal court jurisdiction, the trial court ought to be able to consider whether or not the modification will produce a significant risk of harm to the plaintiff class, even if the trial court considers that risk not to rise to constitutional proportions.

B. The Trial Court Should Be Guided by the Remedial Purposes of the Consent Decree in Determining Whether to Grant Modification

For the above reasons, the Court should reject petitioners' argument that a trial court is required to modify a consent decree at the request of a defendant unless the trial court finds that the conditions resulting from the modified consent decree would affirmatively violate the Constitution.

The conclusion that the Court should reject petitioners' modification standard is buttressed by the existence of an appropriate

alternative standard that the trial court can apply. The appropriate measuring stick is not the Constitution but the remedial purposes of the decree. In amici's view, and in the view of most lower courts charged with enforcing institutional consent decrees, a proposed modification that frustrates the central remedial purposes of the decree should not be granted absent exceptional circumstances. Petitioners' contention that even the central remedial purposes of a consent decree should be subject to modification at the defendants' request, so long as the resulting judgment does not violate the Constitution, would convert consent decrees into unilateral policy statements that the government could alter whenever it chose.

Nothing in Carey supports such a radical view. To the contrary, the Carey court carefully emphasized that the central

purposes of the consent decree were left undisturbed by the modification it approved:

Here, as in Swift, the modification is proposed by the defendants. But it is not, as in Swift, in derogation of the primary objective of the decree, namely, to empty such a mammoth institution as Willowbrook; indeed defendants offered substantial evidence that, again in contrast to Swift, the modification was essential to attaining that goal at any reasonably early date. To be sure, the change does run counter to another objective of the decree, namely, to place the occupants of Willowbrook in small facilities bearing some resemblance to a normal home, but any modification will perforce alter some aspect of the decree.

Carey, 706 F.2d at 969. (Emphasis added).

In Kozlowski v. Coughlin, 871 F.2d 241 (2d Cir. 1989), the Second Circuit reaffirmed the Carey standard and held that, in institutional reform cases, the party requesting modification must demonstrate that the modification is necessary to achieving the goal of the decree:

The analysis must identify the essential purpose or purposes of the decree in question, and weigh the impact of the proposed modification on

that ultimate objective.

Id. at 247-248.

In an accompanying footnote, the Kozlowski court made clear that the inquiry into the purposes of the decree required an analysis separate from a constitutional analysis:

[T]his is not a case governed by the "reasonable relation" standard. Nor is this an instance where we must "ordinarily defer to the[] expert judgment [of prison officials]." While these standards apply when evaluating the constitutionality of prison regulations, they play no role in determining whether changed conditions warrant modification of a consent decree....[I]f we simply deferred to the state's position when it was reasonably related to a legitimate interest, or abstained because we lacked competence to evaluate the offered proof, we would tip too far in the opposite direction and severely chill the use of consent decrees by rendering them mutable at any time. The standard we set forth better accommodates the need for balance.

Id. at 248 n.8.¹⁰

¹⁰ See also id. at 245:

As [the trial court] so aptly held, "Having entered into the consent decree rather than bringing

In this case, there is a ready guide to the intent of the remedial order since the trial court, in originally adopting the plan that became the basis for the consent decree, referred to the provision of single celling as among the critical features of confinement provided for in the plan. See Memorandum and Orders as to Pretrial Detention Center, October 2, 1978. (A.55). Moreover, the absolute guarantee of single celling affected numerous other aspects of the consent decree. As discussed supra, the parties agreed to an architectural design for the cell fronts that

the dispute [over remedies] to trial, [the Commissioner] cannot now evade an integral portion of that decree on the ground that it was not directly tied to a federal claim." Such a result would impugn the integrity of the court and allow the Commissioner to avoid his bargained-for obligations—while retaining the benefits of concessions he obtained on other issues during the negotiations.

(Footnote omitted).

is appropriate for single celling but dangerous for a double-celled facility. In addition, the parties agreed to a modification reducing the size of the cell from eighty to seventy square feet in contemplation of continued single celling. Other features relating to staffing and the provision of support services such as dining and medical facilities were designed in light of the expectation of a lower total population.

Because it is apparent that the continued provision of single celling was a critical element of the parties' bargain, the trial court appropriately exercised its discretionary authority to maintain the bargain and refused the petitioners' request for modification.

IV. IMPORTANT INTERESTS ARE SERVED BY
ALLOWING STATES AND LOCALITIES TO
SETTLE LAWSUITS

A. The Modification Standard Advocated
by Petitioners Would Make Settlement
Less Attractive to Both Plaintiffs
and Defendants

Ironically, governmental defendants as well as prisoners will be harmed if the Court adopts a standard that requires automatic modification of a consent decree unless the modification will itself result in unconstitutional conditions. If the Court adopts a rule under which governments cannot bind themselves to abide by the terms of a consent decree except to avoid direct unconstitutionality, plaintiffs will be disinclined to settle institutional lawsuits. Rather than face the prospect of motions for modification that would force them to litigate the constitutionality of conditions repeatedly, at any time defendants choose, plaintiffs will elect to try their case in the first instance, when the evidence is

fresh and powerful, and seek a definitive adjudication of rights from the court. Thus, governmental entities wishing to settle an institutional lawsuit may be frustrated by their inability to offer plaintiffs a binding settlement, and may be forced to undergo a complex and burdensome trial ending in judicial imposition of a remedial scheme far less appropriate and efficient than what the parties could have negotiated.

It may be contended that plaintiffs will always have an incentive to resolve litigation by consent decree, even if such decrees are easily modified at the request of defendants. According to this argument, any provision in a consent decree that goes beyond constitutional minima is a gain for plaintiffs over what they could have achieved at trial, even if it is later removed by a motion to modify.

This argument ignores the reality that, in consent decree negotiations,

plaintiffs often trade off benefits to which they are presumptively constitutionally entitled in exchange for others to which their constitutional right is not clearly established. Government officials often find that such an arrangement suits their needs as well. For example, one of the defendants' major concerns may be the timing of the remedial steps, and they may be willing to grant substantive remedies beyond what the Constitution requires in exchange for delays in the implementation. As long as such agreements are enforceable, they allow the parties to construct a remedial scheme that reflects the unique facts of the situation and the parties' particular needs and priorities.¹¹ However, plaintiffs are

¹¹ As outlined in the brief of amici Breed, et al., correctional officials facing litigation over prison or jail conditions often choose to resolve the suit by consent decree in order to maximize their participation in formulating the remedial plan. The range of possible remedies in conditions of confinement cases is especially broad, since these lawsuits

unlikely to give away benefits that they will probably win at trial in exchange for concessions from defendants that may not be enforced. Thus, under petitioners' proposed modification standard, settlement becomes markedly less attractive to plaintiffs.

B. Allowing Defendants Easy Modification of Consent Decrees Has the Perverse Effect of Undermining Defendants' Ability to Enter into Consent Decrees.

All parties and amici are in agreement on the utility of consent decrees

typically involve a number of issues. See, e.g., Brief of Petitioner Rufo at 2 (instant case involves disputes over heating, ventilation, plumbing, vermin infestation, noise levels, fire safety, food service, clothing, and overcrowding). Such conditions, "alone or in combination," may deprive prisoners of the minimal civilized measure of life's necessities. Rhodes v. Chapman, 452 U.S. at 347. Thus, the existence or nonexistence of a constitutional violation must be determined by examining conditions "taken as a whole." Hutto v. Finney, 437 U.S. at 687. For this reason, there are, in any given case, many possible remedial plans that would cure the constitutional violation. Consent decrees enable correctional officials to participate in choosing among these possibilities.

as a means of resolving institutional litigation. See also Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 Duke L.J. 887, 899 (1984). Negotiation of consent decrees, like any negotiation, involves making concessions on issues of importance to one's adversary in exchange for gains in areas important to oneself.¹² If this Court were to adopt a standard allowing routine modification of consent decrees, governments would be seriously handicapped in their attempts to

¹² [P]romising is an act done with the public intention of deliberately incurring an obligation the existence of which in the circumstances will further one's ends. We want this obligation to exist and to be known to exist, and we want others to know that we recognize this tie and intend to abide by it.

resolve lawsuits on favorable terms.¹³ As Judge Posner has observed, "[n]ot even the government will benefit in the long run from being excused from having to honor its agreement; for who will make a binding agreement with a party that is free to walk away from an agreement whenever it begins to pinch?" Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1020 (7th Cir. 1984) (en banc).¹⁴

¹³ Allowing the parties maximum freedom to bargain promotes settlement. See Evans v. Jeff D., 475 U.S. 717, 732 (1986) ("a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement"). See also Moore v. National Association of Securities Dealers, 762 F.2d 1093, 1112 (D.C.Cir. 1985) (Wald, J., concurring in the judgment) (civil rights plaintiffs' ability to waive statutory attorney fees is useful "bargaining chip" and encourages settlement).

¹⁴ The converse is not true. Contrary to the assertion of amici State Attorneys General (Brief of State of Tennessee, et al., at 24), there is no danger that a strict standard for modification will discourage government

C. Considerations of Finality,
Efficiency, and Federalism Require
Stability in Consent Decrees

"There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Ackermann v. United States, 340 U.S. 193, 198 (1950). Entry of a consent decree should be regarded, in an important sense, as the end of the case, not as a springboard for further litigation. If cases are settled without parties being meaningfully bound to comply with the terms of the settlement, post-judgment proceedings will be multiplied, parties will be required to prepare and try

officials from entering into consent decrees. As explained below, the parties can, if they desire, include a provision allowing modification under whatever circumstances they choose.

There is, however, a danger that if modification is freely granted, defendants will be tempted to avoid burdensome or embarrassing trials by making settlement offers they do not intend to carry out or are not sure they can carry out, looking to a modification motion as an escape hatch.

the same case repeatedly, and every change in the personalities involved in the case may result in a new call for court intervention. In such a world, institutional cases would be in perpetual litigation, and the interest of governments in operating their institutions and agencies with a minimum of outside interference would be disserved.¹⁵

Considerations of social utility also counsel stability of consent decrees:

[A] consent decree, like any contract, presumably represents an efficient allocation of risks between the parties to the litigation. Parties negotiating a decree normally contemplate the foreseeable risks of their positions and strike a bargain that maximizes each party's utility. Thus, absent dramatically changed conditions, modification of a consent decree is likely to reach a less efficient result than enforcement of the initial decree.

¹⁵ Contrary to the assertion of amici State Attorneys General (Brief of State of Tennessee, et al., at 25), it is the proliferation of hotly-contested motions to modify consent decrees, not their strict enforcement, that will crowd the dockets of the federal courts.

Jost, From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts, 64 Tex. L. Rev. 1101, 1130 (1986) (footnotes omitted). Even if the growth in jail population were a development completely unforeseen at the time of the negotiations for the consent decree, which it was not,¹⁶ it does not follow that the burden should now be borne by the prisoner class:

Judge Posner and Professor Rosenfield, in their article considering modification of contracts to accommodate impossibility,¹⁷ explained the conditions under which modification of a contract in the face of unforeseen developments might be

¹⁶ See Respondents' Statement of the Case, noting that petitioners were aware of the population increases but did not seek modification until it was too late to change the design of the cell fronts to provide a safer environment for double celling. The respondents agreed to a reduction of the size of the cells to be built; that agreement was obviously premised on the parties' reliance on the consent decree's guarantee of single celling.

¹⁷ Posner & Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Stud. 83 (1977).

efficient. If an event occurs that was unforeseen at the time of contract negotiation and that makes performance by the promisor considerably more burdensome, modification is appropriate if it would shift the loss to the party who was ex ante the superior risk-bearer, the party who could have at less cost prevented or insured against the loss. This loss shifting is efficient because, by definition, the superior risk-bearer can bear the risk at lower cost. Had the parties adverted to the potential risk at the time of negotiation, they would have shifted the risk to this party. By imposing the risk on the superior risk-bearer, the court merely achieves the result the parties would have reached through bargaining had they been aware of the problem and provides additional incentives to reach this result.

The obligor is the only party with an active duty to perform under a consent decree. Thus, only the obligor may encounter greater costs of performance by the eventuation of an unforeseen risk. Enforcement of the initial decree without modification leaves the unforeseen costs with the obligor; modification shifts them to the beneficiary. Under Posner and Rosenfield's analysis, therefore, modification would only be appropriate if the beneficiary were better able to prevent or insure against the risk.

Jost, supra, at 1138-1139 (footnotes omitted).

In the case of consent decrees regarding jail or prison conditions, of course, the prisoner class is utterly powerless to prevent or ensure against unforeseen occurrences. In the instant case, for example, the prisoners obviously have no control over crowding at the jail. The petitioners, by contrast, have substantial ability to affect the jail's population—for example, by building or otherwise acquiring additional facilities.¹⁸ Since petitioners are the superior risk-bearers, it would make no economic sense to shift the loss to the plaintiff class by granting the proposed modification. Such a modification would remove any incentive for petitioners, the parties better able to prevent overcrowding, to do so.

¹⁸ In connection with Petitioner Rufo's motion for modification, respondents presented evidence that modular housing units could easily be installed in the rear yard of the new jail. A. 236, 266-269.

Adopting a more liberal standard for modification of consent decrees would give the parties less autonomy, not more.

[T]he parties can always contract to permit future modification under a regime in which their contract is enforced. They cannot, on the other hand, assure stability in a regime in which the court is free to modify as it chooses. The litigants will thus prefer the more stable alternative insofar as it permits them greater choice and control.

Jost, supra, at 1129-30 n.173. For example, in the instant case the parties could have bargained for a provision in the consent decree allowing double celling in the event that jail intake exceeded capacity by a certain amount over a given period of time. However, they did not. If the petitioners' proposed modification is now approved, the respondents are bound, over their objections, to a consent decree fundamentally different from the one they signed. Cf. United States v. Ward Baking Co., 376 U.S. 327, 334 (1964) (court cannot enter a consent decree to which

a party has not agreed). See also Local No. 93, 478 U.S. at 522.

Amici State Attorneys General express concern at the prospect of government officials entering into consent decrees that bind their successors in office. Brief of State of Tennessee, et al., at 26-27. This is hardly a remarkable occurrence; government officials routinely enter into contracts and leases that bind their successors for years to come.¹⁹ More fundamentally, however, these amici do not explain why this is a federal constitutional concern. As they point out, states have various laws limiting the ability of officials to bind their successors. Id. at 27; see also Washington v. Penwell, 700 F.2d 570, 573 (9th Cir. 1983) (provisions of Oregon Constitution). A state may well decide that allowing its officials

¹⁹ Indeed, state officials often commit their successors in office to decades of debt finance payments for the capital cost of new prison construction.

to bind their successors serves its purposes in settling lawsuits, entering into contracts, and other matters of public concern. If a state makes this choice through its democratic process, principles of federalism require that a federal court not overrule it.²⁰ Thus, except for ensuring that state officials do not enter into consent decrees that are beyond their authority under state law, see Penwell, 700 F.2d at 573-574, federal courts have no interest in preventing state officials from entering into lawful agreements that bind future administrations.

In sum, principles of federalism require that state and local governments be

²⁰ Federal courts must be guided by "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971).

treated as fully competent actors, free to enter into binding agreements that they believe are beneficial to them. It would be anomalous indeed if this Court, in the name of federalism, decided that a state has less power to bind itself than an individual or a corporation.

CONCLUSION

For the above reasons, the amici urge the Court to affirm the decisions of the lower courts.

Respectfully submitted,

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
ALEXA P. FREEMAN
ALVIN J. BRONSTEIN
NATIONAL PRISON
PROJECT OF THE
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
1875 Connecticut Ave. NW
Suite 410
Washington, DC 20009
(202) 234-4830

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL
LIBERTIES UNION
132 West 43 Street
New York, NY 10036

JOHN REINSTEIN
CIVIL LIBERTIES
UNION OF MASS.
19 Temple Place
Boston, MA 02111

Attorneys for Amici Curiae

Date: May 31, 1991

MAY 31 1991

OFFICE OF THE CLERK

(17) (17)
Nos. 90-954, 90-1004

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, et al.,
Petitioners,
v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
Petitioner,
v.

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For the First Circuit

AMICUS CURIAE BRIEF OF THE CENTER
FOR DISPUTE SETTLEMENT

Susan P. Sturm
C. Lani Guinier
(Counsel of Record)
University of Penn.
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-5638

Center for Dispute
Settlement
1666 Connecticut
Ave., N.W.
Suite 501
Washington, DC
20009

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
I. CONSENT DECREES ENABLE THE DEVELOPMENT OF FAIR, EFFECTIVE, AND LEGITIMATE REMEDIES THAT PRESERVE THE DISCRETION OF LOCAL AND STATE GOVERNMENT IN INSTITUTIONAL REFORM LITIGATION	5
II. THE CONTINUED VIABILITY OF CONSENT DECREES DEPENDS ON THE COURTS' AUTHORITY TO ENFORCE DECREES THAT PROVIDE BROADER RELIEF THAN A COURT COULD HAVE ORDERED AFTER TRIAL	16
III. STABILITY AND ENFORCEABILITY ARE KEY ATTRIBUTES OF CONSENT DECREES AND REQUIRE THAT UNILATERAL JUDICIAL MODIFICATION CANNOT BE EASILY OBTAINED . . .	21
IV. CONCLUSION	29

TABLE OF AUTHORITIES

Cases

<u>Allen v. Alabama State Bd. of Educ.</u> , 816 F.2d 575 (11th Cir. 1987)	10
<u>Inmates of Suffolk County Jail v. Kearney</u> , 573 F.2d 98 (1st Cir. 1978)	14
<u>Inmates of Suffolk County Jail v. Eisenstadt</u> , 360 F. Supp. 676 (D. Mass. 1971)	13
<u>Local 93, Int'l. Ass'n. of Firefighters v. Cleveland</u> , 478 U.S. 501, 525 (1986)	20
<u>Local No. 93, Int'l. Ass'n. of Firefighters v. City of Cleveland</u> , 478 U.S. 501 (1986)	16
<u>United States v. City of Miami</u> , 664 F.2d 435 (11th Cir. 1981)	9
<u>United States v. City of Yonkers</u> , 856 F.2d 444 (2d Cir. 1988) <u>reversed on other grounds sub. nom. Spallone v. United States</u> , 110 S.Ct. 625 (1990)	10

Publications

<u>Bourne, Ruminations on the Psychology and Methodology of Settlement Negotiations</u> , in <u>Settlement and Plea Bargaining 1</u> (M. Edwards ed. 1981)	16
--	----

E. Lind and T. Tyler, <u>The Social Psychology of Procedural Justice</u> 4-5 (1988)	8
Eisenberg, <u>Private Ordering Through Negotiation: Dispute Settlement and Rulemaking</u> , 89 Harv. L. Rev. 637, 657 (1976)	12
L. Susskind and J. Cruikshank, <u>Breaking the Impasse: Consensual Approaches to Public Disputes</u> 25, 27 (1987) .	8-10, 18, 21, 23
L. Bacow and M. Wheeler, <u>Environmental Dispute Resolution</u> 18-19 (1984)	9, 12, 17
McGovern, <u>Toward a Functional Approach for Managing Complex Litigation</u> , 53 U. Chi. L. Rev. 440, 459-60 (1986)	12, 15, 18
Menkel-Meadow, <u>Toward Another View of Legal Negotiation: The Structure of Problem-Solving</u> , 31 UCLA L. Rev. 754, 793-94 (1984)	21
Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution, <u>Paths to Justice: Major Public Policy Issues of Dispute Resolution</u> 10-14 (1983)	7, 20, 22
Sturm, <u>A Normative Theory of Public Law Remedies</u> , forthcoming in 79 Geo. L. J. (June 1991)	6

INTEREST OF AMICI CURIAE

The Center for Dispute Settlement ("CDS") is a national dispute resolution organization that has facilitated the resolution of thousands of public and private disputes, including institutional reform litigation. Since 1971, when CDS was established as a non-profit, tax-exempt organization, CDS has provided mediation, facilitation, training, and designing of systems for resolving disputes. Representatives of CDS have assisted federal courts in developing consensual remedies in a variety of institutional reform contexts.

CDS is committed to the appropriate use of public consensual dispute resolution as a means of promoting fair, effective, and accessible resolution of

public disputes. This commitment prompts a concern that a decision limiting the scope of consent decrees to the legal violation or adopting a relaxed standard of modification will dramatically limit the use and effectiveness of public consensual dispute resolution in institutional reform litigation. This result would deprive the courts and the parties of the considerable benefits of combining formal and informal processes of dispute resolution to develop remedies in these cases. The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This brief deals specifically with the issue of the potential impact of this

case on the use of consent decrees in a wide variety of institutional reform contexts. Consent decrees enable the development of legitimate, fair, and workable remedies in institutional reform litigation. By relying on the parties to develop and approve remedial plans, the consent decree process builds on the expertise of those responsible for implementing them, and preserves the autonomy of state and local government officials.

The continued viability of consent decrees depends on the capacity to approve and enforce agreements that go beyond what the courts could order after trial. A decision that limits this capacity would remove plaintiffs' incentives to reach agreement, limit the capacity of the

parties to reach agreement, and reduce the potential of consent decrees to produce effective and fair remedies.

A relaxed standard for modifying consent decrees, such as the standard proposed by petitioners, would also threaten their continued use and effectiveness. Unless parties, particularly plaintiffs, can rely on the terms of the agreement, they will have little incentive to negotiate or approve consent decrees. A liberal standard will also create disincentives for the defendants to assume responsibility for developing and implementing a feasible remedy, and for the parties to assume responsibility for defining the terms and circumstances governing modification. Stability and enforceability are thus

essential to realizing the advantages of consent decrees as a mechanism for developing fair, legitimate, and workable remedies in institutional reform litigation.

I. CONSENT DECREES ENABLE THE DEVELOPMENT OF FAIR, EFFECTIVE, AND LEGITIMATE REMEDIES THAT PRESERVE THE DISCRETION OF LOCAL AND STATE GOVERNMENT IN INSTITUTIONAL REFORM LITIGATION

Consent decrees are widely used to resolve environmental, school desegregation, employment, antitrust, housing discrimination, prison, and other institutional reform litigation.

Frequently, as in this case, they are entered after a finding of liability. In addition to the potential savings of time and resources achieved by avoiding further litigation, consent decrees afford the possibility of combining formal and

informal processes of dispute resolution to enhance the effectiveness and legitimacy of institutional reform remedies. As illustrated by the process used to develop the consent decree in this case, the values of participation, reasoned decisionmaking, and local and state governmental autonomy can best be preserved through consensual processes of remedial formulation. See generally Sturm, A Normative Theory of Public Law Remedies, forthcoming in 79 Geo. L. J. (June 1991).

The process of developing a consent decree allows for substantial and meaningful participation in remedial formulation by those affected by and responsible for the targeted problem. For example, in the case under

consideration, the Sheriff of Suffolk County, the Massachusetts Commissioner of Correction, the Mayor of Boston, Boston City Councillors, and lawyers for the plaintiffs engaged in a process of developing a plan that was acceptable to all of the parties in the litigation. Sher. Pet. 15.¹

This form of direct and informal participation in the remedial formulation process has a number of important advantages over traditional adversary process. See Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution,

¹ "Sher. Pet." refers to the Sheriff's Petition for Writ of Certiorari. "J.A." refers to the Joint Appendix. "Sher. Brf." refers to Sheriff Rufo's Brief. "Comm. Brf." refers to Commissioner of Correction Rapone's Brief.

Paths to Justice: Major Public Policy
Issues of Dispute Resolution 10-14 (1983).

The process of developing a consensual plan enables the participants to consult appropriate experts, exchange relevant information, and account for the range of interests and concerns of those involved. It includes the range of perspectives that must be considered to develop an effective, fair, and workable remedy.

There is evidence that remedies developed through direct party participation are more likely to be perceived as fair. See

E. Lind and T. Tyler, The Social Psychology of Procedural Justice 4-5

(1988); L. Susskind and J. Cruikshank, Breaking the Impasse: Consensual

Approaches to Public Disputes 25, 27

(1987). Participation in the process of

formulating the consent decree also increases the likelihood of acceptance of and commitment to the resulting remedy -- often a major problem in institutional reform litigation. See L. Susskind and J. Cruikshank, supra at 25; L. Bacow and M. Wheeler, Environmental Dispute Resolution 18-19 (1984); United States v. City of Miami, 664 F.2d 435, 442 (11th Cir. 1981)(en banc)("willing compliance will be more readily generated by consent decrees than would mandates imposed at the end of bitter and protracted litigation").

Finally, consent decree formulation preserves and builds on the discretion and expertise of local and state governmental officials. Those with responsibility for the institutions at issue play a key role in the remedial formulation process.

Their knowledge, concerns, and interests must be reflected and accounted for if a consensus is to be achieved. Moreover, the consent decree process in no way compromises the authority of affected governmental agencies to judge for themselves whether to approve a proposed agreement. L. Susskind and J. Cruikshank, supra at 184-85, 241-42. See United States v. City of Yonkers, 856 F.2d 444, 454 (2d Cir. 1988), reversed on other grounds sub nom. Spallone v. United States, 110 S.Ct. 625 (1990) ("By its approval of the Consent Judgment the City Council itself selected the remedy...and cannot complain that the District Court approved the agreement"); Allen v. Alabama State Bd. of Educ., 816 F.2d 575, 577 (11th Cir. 1987) ("It is, of course, right

for United States Courts to be concerned about the vitality of our federal system, but we disagree that enforcing a settlement made by a state board undermines important principles of federalism...."). The process of developing and approving a consent decree thus builds in sensitivity to both implementation concerns and officials' judgments concerning the public interest.

The consent decree process also develops a sound, workable, and principled remedy in institutional reform cases. In these cases, the legal standard does not necessarily dictate the content of the remedy or provide adequate guidance concerning which of the range of possible remedial approaches should be adopted. The parties frequently are better situated

to achieve an optimal solution that accounts for their respective interests, satisfies the relevant legal requirements, and promises to work. See McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. Chi. L. Rev. 440, 459-60 (1986); L. Bacow and M. Wheeler, supra at 18-19. Purely legalistic remedies frequently exclude from consideration the principles most germane to a particular situation. "In a real sense, therefore, traditional adjudication may actually be a less principled process than dispute negotiation" in this context. Eisenberg, Private Ordering Through Negotiation: Dispute Settlement and Rulemaking, 89 Harv. L. Rev. 637, 657 (1976). Structured negotiation is more likely to identify the

principles relevant to the dispute and to structure a remedy that accounts for those principles. It may also enable the court to avoid imposing a remedy that is potentially more intrusive and less reflective of the technical and institutional dimensions of the problem.

The case before the Court illustrates the advantages of consent decrees as a means of developing principled, workable remedies in institutional reform litigation. Having determined that the Charles Street jail violated the prisoners' constitutional rights and must be closed, the district court charged the defendants with the responsibility of producing a plan for a new jail. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 686, 691 (D. Mass. 1971).

When the defendants failed to produce such a plan, the district court set a deadline for the closure of the jail, and ordered the acquisition and renovation of existing facilities in Suffolk and Middlesex Counties. J.A. 22, 34. All parties were dissatisfied with the judicially imposed remedy, and appealed. After further unsuccessful negotiations, the Court of Appeals held that if the defendants did not submit an acceptable plan by October 2, 1978, the Charles Street Jail would close on that date. Inmates of Suffolk County Jail v. Kearney, 573 F.2d 98, 101 (1st Cir. 1978). It was only through the process of developing a consensual plan, building on the expertise of the parties and architectural planners, that the draconian remedy of closing the jail was

averted, and a suitable and acceptable remedial alternative was achieved. Sher. Pet. 15a. See also McGovern, supra at 465 (representatives of parties to litigation over Indian salmon fishing rights described the disadvantages of a judicially imposed resolution, including the increased intrusiveness of the court and the adverse impact on tribal relations, and recommended that a negotiated plan was preferable to a litigated one).

Thus, the values of meaningful participation, reasoned decisionmaking and respect for state and local government are preserved through a consensual process of remedial formulation. Consent decrees are a crucial mechanism for achieving

legitimate, fair, and workable remedies in institutional reform litigation.

**II. THE CONTINUED VIABILITY OF
CONSENT DECREES DEPENDS ON THE
COURTS' AUTHORITY TO ENFORCE
DECREES THAT PROVIDE BROADER
RELIEF THAN A COURT COULD HAVE
ORDERED AFTER TRIAL**

This Court's decision in Local No. 93, Int'l. Ass'n. of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) that "a federal court is not necessarily barred from entering a consent decree because the decree provides broader relief than the court could have awarded after a trial" is essential to the use of consent decrees to resolve institutional reform litigation. One of the most significant incentives to enter into a consent decree is the desire to minimize the risk of uncertainty concerning the applicable legal standard. See Bourne, Ruminations

on the Psychology and Methodology of Settlement Negotiations, in Settlement and Plea Bargaining 1 (M. Edwards ed. 1981).

If parties cannot rely on the enforceability of their agreements in the event that the law proves to be more favorable to their adversary, the benefits obtained by reaching agreement are dramatically reduced, along with the incentives to enter into consent decrees. See M. Bacow and W. Wheeler, supra at 20 ("Uncertainty over prospects for enforcement of a potential agreement may cripple negotiations").

The capacity to achieve consent decrees in institutional reform cases also depends on the ability to trade items that are valued differently by the participants in the negotiations. These items may not

be required by the legal standard at issue. In fact, if the parties are restricted in the negotiations to the case's legal issues, their ability to reach agreement is dramatically limited. However, if the parties are able to consider other items that are not necessarily required by the legal standard, combinations of terms that are acceptable to the various parties can be fashioned. McGovern, supra at 462. This possibility stems from fact that the parties frequently value the same things differently. See id.; L. Susskind and J. Cruikshank, supra at 120.

For example, prison officials may be willing to agree to a jail design that afford inmates privacy in their cells -- something they are not constitutionally

required to provide -- in exchange for the continued use of an unconstitutional facility until a new one is constructed - - something that the plaintiffs may be legally entitled to prevent. Unless the parties can introduce and negotiate over items reflecting their basic concerns, consent decrees will be difficult to achieve.

Finally, introducing a new requirement that consent decrees be narrowly tailored to the legal violation will detract from the capacity to achieve wise, effective, and principled remedies.²

² Local 93 establishes several conditions for the approval of consent decrees. Consent decrees must: (1) "spring from and serve to resolve a dispute within the court's subject matter jurisdiction"; (2) "'com[e] within the general scope of the case made by the pleadings;" and (3) "further the objectives of the law upon which the

A fundamental virtue of negotiated remedies is the enhanced opportunity to develop and apply principles governing the negotiations, to address the demands and concerns underlying the legal violation, and to develop an appropriate remedy. If consent decrees are limited to the remedies a court could order after trial, they frequently will not be able to proceed in relation to the principles most germane to the parties or to develop a workable, lasting resolution to the problems underlying the legal violation. See Report of the Ad Hoc Panel on Dispute Resolution, supra at Appendix 1, Table 1. Moreover, a legalistic orientation in

complaint was based". In addition, the terms may not conflict with or violate federal law. Local 93, Int'l. Ass'n. of Firefighters v. Cleveland, 478 U.S. 501, 525 (1986).

negotiations tends to restrict the parties' creativity and willingness to engage in collaborative fact-finding and joint problem solving -- often essential to producing an appropriate remedy. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. Rev. 754, 793-94 (1984); L. Susskind and J. Cruikshank, *supra* at 30 ("The search for a wise resolution of differences requires a collaborative inquiry -- one that breaks down a complex problem into a series of mutually agreed-upon pieces").

**III. STABILITY AND ENFORCEABILITY ARE
KEY ATTRIBUTES OF CONSENT
DECREES AND REQUIRE THAT
UNILATERAL JUDICIAL MODIFICATION
CANNOT BE EASILY OBTAINED**

Parties, particularly plaintiffs, depend on the enduring quality of the

terms of their agreements as the prerequisite for foregoing the opportunity to litigate. Unless they have adequate assurance that they are likely to realize the benefits of their bargain, they have little incentive to negotiate or approve consent decrees. Moreover, unless the parties view themselves as bound by the terms of their agreements, they may lack the incentive to take the negotiation process seriously, to give adequate attention to their public responsibilities in crafting a consent decree, to assume responsibility for addressing problems that arise in implementing the decree, and to vigorously pursue compliance. Thus, stability and enforceability are essential to the continued use and effectiveness of consent decrees. See Report of the Ad Hoc

Panel on Dispute Resolution and Public Policy, supra at 17; L. Susskind and J. Cruikshank, supra at 31.

Several considerations motivate the parties to enter into consent decrees, each of which is undercut if a relaxed standard of modification is adopted. First, parties seek to minimize the risks of uncertainty and delay that accompany litigating to judgment. An overly liberal standard of modification, such as the standards proposed by the petitioners, Sher. Brf. 32; Comm. Brf. 56, reintroduces risks and uncertainties to the consent decree process; the future of the negotiated agreement depends on the discretion of the opposing party and the judge. A significant attraction of consent decrees is thus lost.

Second, parties are motivated to reach agreements by a desire to avoid further litigation and to achieve a final resolution of the outstanding dispute. Indeed, the consent decree at issue in this case explicitly acknowledges that the agreement was premised on the desire of all the parties "to avoid further litigation on the issue of what shall be built and what standards shall be applied to design and construction." Sher. Pet. 16a. If unilateral modification may be freely granted by the court, the parties will have little faith that their agreement will endure or that it will avoid future litigation. Indeed, by enabling the opposing party to select the timing of and circumstances surrounding litigation concerning a modification

request, petitioners' proposed modification standards may lead parties to conclude that modification litigation is inevitable and disadvantageous to a favorable presentation of their case.

Finally, agreement depends on the assurance that concessions made by parties in the process of negotiation will be balanced by provisions accommodating their interests and concerns, and that the resulting agreement will be enforced. A relaxed standard of modification undermines the parties' confidence that the trade-offs that induced them to reach agreement will be honored. Parties may be tempted to strike a balanced agreement, and then later seek modification on the points most crucial to the opposing party. If parties perceive this to be a realistic

possibility, the attraction of consent decrees may well disappear.

A relaxed standard of modification also creates powerful disincentives to assume responsibility for both the substantive terms of the agreement and the circumstances and processes for addressing problems that arise concerning its workability and enforcement. If defendants perceive that requests for modification will be freely granted, they may not take the negotiation process seriously and assume responsibility for developing an agreement that is feasible and acceptable and accounts for the range of public interests affected by the proposed remedy. The anticipation of easy judicial modification, coupled with an understandable desire to avoid litigation,

may lead defendants to make promises that they either cannot or will not keep. This will not only guarantee subsequent litigation; it will also reduce the potential of consent decrees to produce wise, principled and effective agreements.

Petitioners' proposed modification standards place courts, rather than the parties, in the position of defining the circumstances and processes for addressing problems that arise in the future. Yet the terms governing future modification are important elements of the underlying agreement. The parties are frequently better situated to craft a mechanism for addressing disputes and problems that may arise. Modifications reached by agreement preserve the advantages of participation, collaboration, and reasoned decisionmaking

that characterize consensual resolution of public disputes. Negotiations concerning the terms of modification are likely to flesh out the parties' purposes and interests, and thereby ease the courts' task in the event that consensual modifications cannot be reached. If courts freely step in and impose unilateral modifications, there will be little incentive to assume responsibility for defining the terms and circumstances governing modification, and thus to preserve many of the virtues of consent decrees described earlier.

In sum, the standards governing the modification of consent decrees are a critical determinant of the incentives to enter into consent decrees and the fairness and legitimacy of the consent

decree process. The continued viability of consent decrees depends on a modification standard that preserves the attributes of stability and enforceability.

IV. CONCLUSION

This case has the potential to limit drastically the availability and effectiveness of consent decrees as a means of resolving institutional reform litigation. Standards that limit the parties to the relief courts could order after trial or allow easy modification would chill plaintiffs' willingness to settle, undermine defendants' incentives to negotiate feasible and effective remedies, and seriously limit the current potential of consent decrees to produce fair, legitimate, and workable remedies in

a wide variety of institutional reform cases. For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Susan P. Sturm
C. Lani Guinier
(Counsel of Record)
University of Penn.
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-5638

Center for Dispute
Settlement
1666 Connecticut
Ave., N.W.
Suite 501
Washington, DC
20009



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,

v.

INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE
Lawyers' Committee For Civil Rights
Under Law of the Boston Bar Association
In Support of Respondents

OZELL HUDSON, JR.
Lawyers' Committee for Civil
Rights Under Law of the
Boston Bar Association
294 Washington Street
Boston, Massachusetts 02108
(617) 482-1145

LORETTA M. SMITH
JOHN C. ENGLANDER*
PETER F. YOUNG
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

Counsel for Amicus Curiae Lawyers' Committee For Civil Rights
Under Law of the Boston Bar Association

**Counsel of Record*



TABLE OF CONTENTS

I. STATEMENT OF INTEREST	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT	2
III. ARGUMENT	3
A. Three Important Principles Of Federal Law Support Adoption Of A Strict Standard For Modification	3
1. Consent Decrees Are An Important Means Of Settling Litigation, And Enforcement Of Such Decrees Is Accordingly Important	5
2. The Important Principle Of Finality Dictates That Modification Should Not Lightly Be Granted	7
3. Concerns About the Integrity Of Pleading In The Federal Courts Support A Strict Standard For Modification	9
4. The Above Principles Support A Strict Standard For Modification	10
B. Upon Application Of The Proper Modification Standard, The Decision Of The Court Of Appeals Should Be Affirmed	15
1. The Standard Of Review Of A Decision On A Request To Modify A Consent Decree Should Be Especially Deferential	15
C. A District Court Should Not Be Obligated To Modify Or Vacate A Consent Decree Upon A Finding Of No Further Constitutional Violation	20
IV. CONCLUSION	26

TABLE OF AUTHORITIES

Cases:

<i>Ackermann v. United States</i> , 340 U.S. 193 (1950)	8
<i>Allen v. McCurry</i> , 449 U.S. 90 (1980)	7
<i>Anderson v. Bessemer City</i> , 470 U.S. 564 (1985)	16
<i>Armstrong v. Board of School Directors</i> , 616 F.2d 305 (7th Cir. 1980)	6
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979)	16,17
<i>Board of Education of Oklahoma City v. Dowell</i> 111 S.Ct. 630 (1991)	4,23,24
<i>Callanan Road Improv. Co. v. United States</i> , 345 U.S. 507 (1953)	9
<i>Davis v. Wakelee</i> , 156 U.S. 680 (1895)	9
<i>Duran v. Elrod</i> , 760 F.2d 756 (7th Cir. 1985)	7,13,20
<i>Evans v. Jeff D.</i> , 475 U.S. 717 (1986)	5
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944)	12
<i>Hutto v. Finney</i> , 437 U.S. 678 (1978)	16,23
<i>Inmates of the Suffolk County Jail v. Eisenstadt</i> , 360 F.Supp. 676 (D. Mass. 1973)	23
<i>Klapprott v. United States</i> , 335 U.S. 601 (1949)	8
<i>Lemon v. Kurtzman</i> , 411 U.S. 192 (1973)	16
<i>Local 93, Int'l Ass'n of Firefighters v. City of Cleve-</i> <i>land</i> , 478 U.S. 501 (1986)	6,22
<i>Marek v. Chesny</i> , 473 U.S. 1 (1985)	5
<i>McCleskey v. Zant</i> , 111 S.Ct. 1454 (1991)	8
<i>Milliken v. Bradley</i> , 433 U.S. 267 (1977)	22,23

TABLE OF AUTHORITIES (cont.)

<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	6
<i>NAACP v. Boston Housing Authority</i> , Civil Action No. 88-1155-T (D.Mass.)	1
<i>New York State Association For Retarded Children v. Carey</i> , 706 F.2d 956 (2d Cir. 1983), <i>cert. denied</i> , 464 U.S. 915 (1983)	12
<i>Newton v. A.C.&S., Inc.</i> , 918 F.2d 1121 (3d Cir. 1990)	5,6
<i>Patriot Cinemas, Inc. v. General Cinema Corp.</i> , 834 F.2d 208 (1st Cir. 1987)	9
<i>Plyler v. Evatt</i> , 846 F.2d 208 (4th Cir.), <i>cert. denied</i> , 488 U.S. 897 (1988)	12n
<i>Ruiz v. Lynaugh</i> , 811 F.2d 856 (5th Cir. 1987) . .	16
<i>Southern Pacific R.R. v. United States</i> , 168 U.S. 1 (1897)	8
<i>Swift & Co. v. United States</i> , 276 U.S. 311 (1928) .	21,24,25
<i>System Federation No. 91 v. Wright</i> , 364 U.S. 642 (1961)	17
<i>Twelve John Does v. District of Columbia</i> , 861 F.2d 295 (D.C. Cir. 1988)	10
<i>United States v. Mendoza</i> , 464 U.S. 154 (1984) .	7
<i>United States v. Swift & Co.</i> , 286 U.S. 106 (1932) .	2,7, 10,21,22
<i>United States v. United Shoe Machinery Corp.</i> , 391 U.S. 244 (1968)	12n

Other Authorities:

Jost, <i>From Swift to Stotts and Beyond: Modification Of Injunctions In The Federal Courts</i> , 64 Tex. L. Rev. 1101 (1986)	6,18,19
---	---------

I. STATEMENT OF INTEREST

The Amicus Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association was founded in 1968 to combat institutional race and national origin discrimination. Since its formation, the Boston Lawyers' Committee has initiated several class action lawsuits that have been resolved by consent decrees or consent judgments. *NAACP v. Boston Housing Authority*, Civil Action No. 88-1155-T (D. Mass.) is the most recent example of the Boston Lawyers' Committee's seeking a resolution of the complex societal problem of discrimination through an agreement between the parties rather than a lengthy and costly trial. Wherever possible, the Boston Lawyers' Committee has sought such agreements because they are typically in the interests of all parties. The Boston Lawyers' Committee is, therefore, very concerned with maintaining the integrity of consent decrees and ensuring that public obligors are not freely permitted to renege on obligations they agreed to fulfill.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

For *amicus*, the critical issue in this case is the appropriate standard for modification of consent decrees. The parties and the various *amici* have inundated this Court with proposals for such a standard. These proposals are noteworthy because, taken together, they explicate a number of principles to which *all* parties seem to agree:

1. Consent decrees are an important means for resolving many types of litigation commonly found in the federal courts, including so called "institutional reform" litigation;
2. To be effective, consent decrees must offer a significant measure of finality, both because (a) they are intended to conclude litigation, and (b) they are intended to be binding, as with a contract;
3. Consent decrees nevertheless must be subject to modification upon a sufficient showing of unforeseen, changed circumstances.

The question for this Court is how to strike the balance among these competing concerns. The possible standards span the spectrum between the "grievous wrong" standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932) (*Swift II*), and the standard advocated by petitioner Rapone, the Massachusetts Commissioner of Correction, who argues that modification is *required*, if (1) there is no longer any constitutional violation, or (2) "changed circumstances" and the "public interest" indicate that the consent decree has been rendered "inefficient and inequitable." Br. of Petitioner Thomas C. Rapone, Commissioner of Correction ("Commissioner's Br.") at 26, 30.

Amicus urges the Court to adopt a standard which requires a substantial threshold showing of unforeseen and unforeseeable

changed circumstances before the provisions of a consent decree, once entered voluntarily by the parties, may be set aside. Consent decrees are too important a means of resolving federal court litigation, finally and short of trial, to render them ineffective by adoption of a lenient standard for modification. Important federal interests in settlement, finality, and the integrity of the judicial process support a more exacting standard. Parties to a consent decree should not be encouraged to enter into such decrees in hopes of merely *postponing* litigation on the merits until a more opportune and politically expedient time. Yet that is precisely the outcome which will result from the standards promoted by petitioners.

Application of a standard requiring a strict threshold showing of unforeseen and unforeseeable changed circumstances will result in affirmance of the District Court here. That court considered each of the offerings of petitioners and concluded, as a *factual* matter, that they did not justify excusing petitioners from a deal they struck in 1979 and again in 1985. The District Court was confronted with petitioners who had managed to postpone for 17 years the closing of a jail whose conditions were found unconstitutional, by promising construction of a new jail which provided certain negotiated conditions of confinement — principal among which was that prisoners would be housed one to a cell. It was not error for the District Court to conclude, after weighing this record against petitioners' assertions of an important change in law which had occurred 11 years before, and an important "unforeseen circumstance" of increased prisoner population which had first been addressed in modification proceedings five years before, that those assertions did not justify the setting aside of a negotiated bargain which had been intended to conclude litigation and from which petitioners had realized great benefits.

Finally, the Court should explicitly reject the suggestion of the Commissioner of Correction that modification is required

once it is shown that the constitutional violation has abated. Most injunctions immediately bring the party enjoined into compliance with the law, but the injunction nevertheless remains in place because of legitimate concerns that absent the injunction the enjoined conduct may recur. The Commissioner's suggestion is not supported by this Court's decision in *Board of Educ. of Oklahoma City v. Dowell*, 111 S.Ct 630 (1991), ignores the traditional role of the injunction, and would expose injunctions in institutional reform litigation — even those entered by consent — to perpetual collateral attack. The decision below accordingly should be affirmed.

III. ARGUMENT

A. Three Important Principles Of Federal Law Support Adoption Of A Strict Standard For Modification

The importance of the issue before the Court can be illustrated by examining the position of the petitioner Commissioner of Correction. The Commissioner advances two propositions: (1) that in institutional reform litigation such as this, a consent decree *must* be modified where the constitutional violation no longer exists, and (2) that a consent decree *must* be modified where the government defendant can produce some evidence of changed circumstances, and can demonstrate an important enough public interest to render continuing enforcement of the decree "inequitable."

The simplicity of the Commissioner's arguments is alarming, in that he fails to recognize that adoption of such a standard would immediately call into question the validity of literally thousands of final judgments now entered in the federal courts. Yet the Commissioner's arguments are echoed, to an only

slightly lesser degree, in all the briefs seeking reversal of the judgment below.¹ These arguments suffer from very basic fallacies, in that they fail to recognize at least three important and prevalent principles of federal law — the federal interests in promoting settlement, in finality of judgments, and in the integrity of litigation proceedings.

1. *Consent Decrees Are An Important Means Of Settling Litigation, And Enforcement Of Such Decrees Is Accordingly Important*

It is perhaps belaboring the obvious to point out that there are important federal interests in settling litigation in the federal courts short of trial. This federal interest has been recognized by this Court on numerous occasions, recently in *Evans v. Jeff D.*, 475 U.S. 717, 732-734 (1986), where the Court discussed the benefits of settlement in the context of civil rights litigation, and noted that policies which disserve settlement will “forc[e] more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants.” *See also* 475 U.S. at 767 n.15 (Brennan, J., dissenting) (“[b]y lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiff an opportunity to obtain relief at an earlier time.”); *Marek v. Chesny*, 473 U.S. 1, 10 (1985). The interest has been recognized in numerous decisions in the lower courts as well. *See, e.g., Newton v. A.C.&S., Inc.*, 918 F.2d 1121,

¹ Ironically, the Commissioner did not make any of these arguments before the District Court. The Commissioner did not take a position with respect to the Sheriff’s requested modification, and chose not to file a brief.

The other petitioner, the Sheriff of Suffolk County, does not argue that a consent decree in institutional reform litigation must be modified where the constitutional violation no longer exists. The Sheriff’s proposed test, however, suffers from the same fallacies as the Commissioner’s.

1129 (3d Cir. 1990); *Armstrong v. Board of School Directors*, 616 F.2d 305, 312 (7th Cir. 1980).

This Court is well aware of the burgeoning case loads of the federal courts, and has repeatedly confirmed its interest in alternative means for resolving these disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting the “emphatic federal policy in favor of arbitral dispute resolution”). Settlement is the most time honored and the most prevalent of the means of resolving litigation.

When litigation seeks injunctive relief, the mechanism for settling that litigation is a consent decree. Not surprisingly, the use of consent decrees to resolve federal court litigation is exceedingly common. According to statistics maintained by the Administrative Office of the United States Courts, 8,451 cases, or roughly 4% of yearly case dispositions, were resolved by consent decree in the federal courts during the 12 months ended June 30, 1990. Statistics have been reported indicating that 75% of all anti-trust litigation brought by the Federal Trade Commission, and 90% of all Securities and Exchange Commission enforcement proceedings, are resolved by consent decree. Jost, *From Swift To Stotts And Beyond: Modification Of Injunctions In The Federal Courts*, 64 Tex. L. Rev. 1101, 1102-03 (1986). In complex injunctive litigation such as institutional reform cases, consent decrees offer the additional benefit of allowing the parties — who have a much better grasp than the court of their respective needs — to compose the details of the injunction, thereby promoting efficiency while minimizing court intervention.

If settlement by consent decree is to be encouraged, consent decrees must be readily enforceable according to their terms. It is commonly stated that a consent decree is a hybrid, exhibiting characteristics of both contract and judicial order. *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986). As with any contract or judicial order, the

consent decree draws its legitimacy from its ability to be enforced in court. The parties conduct a negotiation leading to a consensual bargain, and they do so on the understanding (as with any contract or order) that failure to adhere to the terms to which they have agreed will result in court intervention to force them to do so.

These concerns plainly support strict, rather than lenient, enforcement of consent decrees, and accordingly, a spartan attitude toward modification. In the words of Judge Posner, "[n]o one will sign a consent decree if the other party is free to walk away from it." *Duran v. Elrod*, 760 F.2d 756, 760 (7th Cir. 1985). No doubt these same concerns animated Justice Cardozo's statement in *Swift II*, 286 U.S. at 120:

What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

2. The Important Principle Of Finality Dictates That Modification Should Not Lightly Be Granted

A second important federal principle which supports a strict standard for modification is the interest in finality of judgments. Often lost in the debate about the need for modification of consent decrees is that such decrees are regarded as final adjudications of the controversy before the court. Principles of *res judicata* and collateral estoppel reflect the importance of repose in our system, and dictate that claims resolved in litigation not be relitigated. The interests of finality embodied in *res judicata* principles serve to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

This Court's concern for and interest in finality has been recognized time and again, from *Southern Pacific R.R. v. United States*, 168 U.S. 1, 49 (1897) to its decision this term in *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). This Court held in *Southern Pacific* that the general rule of *res judicata* "is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." 168 U.S. at 49. Although *McCleskey* concerned the appropriate standard to apply in evaluating successive habeas petitions, it too recognized that "collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." 111 S. Ct. at 1469.

These same concerns about finality of judgments are codified in Rule 60 of the Federal Rules of Civil Procedure. The Rule details only six reasons for relief from a final judgment or order, and places strict time constraints on several of these. Cases construing Rule 60 have repeatedly emphasized the extraordinary nature of the relief, and the extraordinary showing required for such relief. See generally *Klapprott v. United States*, 335 U.S. 601 (1949). Thus, in *Ackermann v. United States*, 340 U.S. 193 (1950) this Court rejected the petitioner's request under Rule 60(b)(6) to be relieved from a denaturalization order noting that petitioner had chosen not to appeal. The Court stated, in language equally applicable here: "the choice was a risk, but calculated and deliberate and as follows a free choice. . . . There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." *Id.* at 198.

These constructions of Rule 60, which are echoed in cases applying Rule 60(b)(5), reinforce the importance of finality of judgments and support a strict standard in addressing modification requests.

3. *Concerns About The Integrity Of Pleading In The Federal Courts Support A Strict Standard For Modification*

Finally, concerns about the integrity of pleadings and representations made during litigation support a strict standard for modification. These concerns are reflected in a broad body of case law which has evolved fairly recently under the heading of "judicial estoppel" — the notion that a party who makes representations to the Court, and succeeds in litigation by virtue of those representations, cannot thereafter adopt a contrary position. *See generally Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (citing cases). The principle was first enunciated by this Court, however, as long ago as 1895:

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formally taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895). *See also Callanan Road Improv. Co. v. United States*, 345 U.S. 507, 513 (1953).

In any case where a party asks a court to modify a consent decree, it is to some degree reneging on a representation previously made to the court that it would comply with the provision it now seeks to change. Doubtless there are various degrees to which such a party is "reneging," as opposed merely to asking for a change in light of unforeseen circumstances. But the above principle is at issue in each instance. One of the questions for the court is whether the party seeking modification, in originally representing to the court that it agreed to

the provisions of the consent decree and thereafter obtaining benefits from that decree, really used the representation (which he now seeks to avoid) to gain an unfair benefit. In this case, for example, respondents might well ask whether petitioners, having obtained a 17-year stay of the closing of the old jail, are only now revealing their true intention not to abide by their part of the bargain. These "judicial estoppel" concerns accordingly also teach that a representation to a court that a party is willing to undertake the obligations of that court's order should not be easily set aside.

4. *The Above Principles Support A Strict Standard For Modification*

Taken jointly or severally, the above principles support adoption of a strict, as opposed to *laissez faire*, standard for modification of consent decrees. The more relaxed the standard, the more parties will be encouraged to enter into consent decrees in hopes of simply putting off until another day actual litigation of disputed issues. Parties should not be encouraged to believe that a settlement sanctified by a final judgment and the terms of a contract can be lightly undone. Nor should parties be encouraged to represent their agreement to the court under circumstances where they feel free to act, down the road, as if they had their fingers crossed behind their back.

Amicus does not minimize the concerns which have lead several courts and commentators to argue, particularly in the context of institutional reform litigation, for a more relaxed modification standard than that enunciated in *Swift II*. But any relaxation must be carefully circumscribed, in light of the above principles. As Judge Mikva stated in affirming the denial of a modification of a similar consent decree in *Twelve John Does v. District Of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988):

Modification is an extraordinary remedy, as would be any device which allows a party — even a municipality — to escape commitments voluntarily made and solemnized by a Court decree.

Amicus accordingly suggests the following test:

1. No modification of a consent decree should be allowed unless the party seeking modification first makes a substantial threshold showing of an unforeseen and unforeseeable change in circumstances, either in fact or law, since the consent decree was entered, which change substantially undermines the foundation of the parties' bargain.
2. If such a threshold showing is made, the court should then consider and weigh a number of factors which bear on whether the requested modification (or any other) should be allowed, including (1) whether the modification sought is in derogation of a principal purpose of the decree, (2) whether the moving party has to date complied with the consent decree in good faith, and (3) the extent to which the failure to modify will adversely impact the public interest, including whether the public interest claimed to be at stake can be accommodated by means less inimicable to the decree.

The above standard is more exacting than those advocated by petitioners and many of the commentators, yet it is consistent with prior decisions of this Court, and with most of the lower court decisions on these issues. The requirement of a substantial threshold showing of unforeseen and unforeseeable changed circumstances is critical to advancing the principles of finality, settlement and judicial integrity discussed above.

Once the threshold showing is met, the remaining factors to be balanced are those commonly identified in the decisions

of this Court and the lower courts. Plainly, the extent to which the proposed modification will strike at the heart of the decree is important, and in many instances it will be outcome determinative. Complete evisceration of the purpose of a decree requires an extreme showing, whereas more marginal changes will require a lesser showing. The party's good faith compliance is also relevant, in particular because it will shed light on the legitimacy of claims of changed circumstances and asserted adverse effects on the public interest. The public interest also must be considered, as it traditionally has been in framing decrees in the first instance. *See e.g., Hecht Co. v. Bowles*, 321 U.S. 321 (1944). But a court should view claims of adverse impact on the public interest with a healthy skepticism. It should be remembered that the government defendant had ample opportunity to consider the public interest *before* it consented to the decree. And in this regard, a court's skepticism concerning the asserted public interest should be heightened where alternative, less intrusive means of accommodating that interest are readily available but not pursued.

The changed circumstances condition was found to be met, as a factual matter, in most instances where modification has been granted.² Thus, in *New York State Association For Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983), where Judge Friendly ruled that modification was appropriate, the Court emphasized that experience in administering the decree had shown that the proposed modification to allow mental hospital patients to be reassigned to facilities larger than those ordered by the consent

² Some cases in which modification has been allowed have involved language in the decree expressly providing methods for modification. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *Plyler v. Evatt*, 846 F.2d 208, 211 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988). Such provisions are to be encouraged, since they will force the parties or the court to focus or define those circumstances that would cause them to revisit the remedy. Those cases should not be viewed as ordinary "modification" cases.

decree was "essential" to attaining the decree's principal goal of emptying the mental hospital. Similarly, in *Duran v. Elrod*, Judge Posner cited as changed circumstances justifying a very limited modification the facts that the City of Chicago had come within seven weeks of fulfilling its obligations under the consent decree, and that due to the consent decree, the Department of Corrections had begun releasing felons accused of violent crimes back into the general population.

While allowing modification of decrees, however, the cases nevertheless recognize the need to scrutinize such requests carefully. Judge Posner, in particular, identifies the need to hold government defendants to representations they have made. In *Duran*, Judge Posner states that the County's limited request for seven weeks of grace was "not unreasonable." He goes on to add, however:

The county promised emphatically at the argument of this appeal that it would not request a further extension (and we add: it had better not renege).

Duran, 760 F.2d at 761.

The *Duran* court's emphasis on holding the County to its obligation no doubt would be echoed by every plaintiff in institutional reform litigation who is faced, as respondents are here, with a motion to modify a consent decree with regard to a term carefully negotiated and agreed upon. The sentiment that a party to a contract "had better not renege" is a familiar sentiment to anyone who has ever had contractual dealings. The standard adopted by this Court with respect to modification must advise all those associated with consent decrees that they should regard their obligations solemnly, and "get it right the first time."

The need to enforce consent decrees according to their terms is recognized in a similarly backhanded — but powerful — fashion in the brief of the Solicitor General. Consistently with

many of the commentators and the lower courts, the Solicitor General's brief advocates "a less stringent standard than that applied in *Swift*" Brief of the United States as Amicus Curiae, at 8. But the Solicitor General could not avoid expressing reservations about a "flexible" standard when the federal government's interests in finality and the sanctity of contract are at issue. Thus, in a footnote, the Solicitor General is compelled to argue that:

On the other hand, in litigation brought by the federal government against the state or local government concerns arising from the supremacy clause may justify the application of a different standard for the review of requests by defendants for the modification of consent decrees.

Id. at 28 n.17.

The Solicitor General's hedge is an apt illustration of the general concerns favoring a spartan attitude toward modification. This Court has received numerous briefs from parties who are often on the wrong end of a consent decree, and who accordingly are advocating relaxed standards for modification of those decrees. But the reasons urged for such a relaxed standard are based less upon principle, and more upon whose ox is being gored. The Solicitor General's footnote demonstrates this emphatically. *Amicus* suggests that there should be no difference between litigation brought by individuals who, as here, have had their constitutional rights violated by a state or local government, and litigation brought by the federal government seeking to redress similar violations. In each case, if a consent decree is entered it is because the state or local government has determined that relief is appropriate, has stated that it will undertake the relief set forth in the decree, and has affirmed that undertaking by signing a contract which has

become a court order. The interest of the plaintiffs in seeing that decree enforced according to its terms, and the potential interest of the state or local government arising out of alleged changed circumstances, do not depend on whether the plaintiff is a private individual or the federal government. The federal government's advocacy for a strict standard where it is the plaintiff (and a more relaxed standard if it is a defendant) thus supports the respondents' position here.

B. Upon Application Of The Proper Modification Standard, The Decision Of The Court of Appeals Should Be Affirmed

1. *The Standard Of Review Of A Decision On A Request To Modify A Consent Decree Should Be Especially Deferential*

Applying the modification standards set forth above, the decision here should be affirmed. To begin, *amicus* notes that there are several good reasons why courts should particularly defer to decisions of the district court with respect to motions for modification. The very fact that institutional reform litigation generally involves affirmative relief reaching far into the future assures that in most cases the district court will be intimately familiar with the history of the litigation, including the record established prior to entry of the consent decree, the basis for the consent decree, and the history of compliance with the consent decree. In many cases the district court may even have been involved in the negotiations as to the consent decree's terms, or subsequent construction of those terms. There, accordingly, is no individual better suited to evaluate whether circumstances have truly changed than the district judge. Nor is there a person better suited to evaluate whether the moving party has acted in good faith, or whether the mod-

ification sought will eviscerate (or effectuate) a principal purpose of the decree.

This Court has often emphasized the general obligation of appellate courts to defer to the fact finding of district courts, see *Anderson v. Bessemer City*, 470 U.S. 564 (1985), and to the discretion exercised by district courts in granting or denying injunctive relief. See *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (*Lemon II*). In the context of a motion to modify a consent decree, these general principles of deference to trial courts are appreciably enhanced by the likely fact that the district court has been involved for many years in administration of the decree. Cf. *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (“[T]he exercise of discretion is entitled to special deference because of the trial judge’s years of experience with the problem at hand”) Plainly, the decision of the trial court on a motion for modification must be afforded great deference. See, e.g., *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (“we note that a district court’s decision to modify a consent decree in an ongoing institutional reform case is committed to that court’s discretion because it is intimately involved in the often complex process of institutional reformation.”).

As the District Court found, the petitioner’s showing in support of modification here failed even to approximate the necessary substantial threshold showing of unforeseen and unforeseeable changed circumstances. Petitioners offered two arguments below: (1) that *Bell v. Wolfish*, 441 U.S. 520 (1979), worked an unforeseen change in the law, and (2) that there had been a radical and unforeseen increase in pre-trial detainees in Suffolk County since the consent decree was entered.

The argument based on *Bell v. Wolfish* was rightfully rejected because the “change” in law — if indeed there was one — was obviously foreseeable, and most likely was a driving force in the thinking of the parties when they entered into the

consent decree. *Bell* was actually under consideration by this Court at the time the consent decree was entered. In settling the case before *Bell* was decided, the parties obviously evaluated the relative risks that the outcome of *Bell* might affect their ability to obtain the result they sought if they litigated the case to conclusion. Put another way, the Sheriff of Suffolk County no doubt considered the possibility that *Bell* might hold unequivocally that conditions of confinement such as those in the Suffolk County jail did not violate the Constitution, and nevertheless chose to settle the case before *Bell* was decided. The Sheriff could have negotiated for a provision in the decree which would have relieved him of his responsibilities if the decision in *Bell* had been favorable, but either he chose not to negotiate, or was unable to bargain for such a provision. Having made that decision and avoided to some degree the risk of an adverse outcome in *Bell*, the Sheriff should not now be allowed to work both ends of the street, by obtaining the benefits of a positive decision through a motion for modification.

This is not a case, as in *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961), where there has been such a clear change in law on the precise issue litigated under the decree that justice requires that the decree be altered or vacated. As Judge Keeton noted, *Bell* certainly did not overrule prior precedent indicating that in some circumstances double bunking in prisons could create an unconstitutional condition. See Sheriff's Petition for Certiorari, at 10a. In his article on modification of injunctions, Professor Jost addressed this issue with remarkable prescience:

For example, a class of prisoners may have extracted from the state a commitment to abolish double celling in exchange for abandoning other claims regarding prison overcrowding or security. A subsequent Supreme Court decision holding double celling con-

stitutional in some circumstances does not justify modification of the decree to deprive the prisoners of this hard-won benefit. Unless changes in the law render the original decree illegal, modification of consent decrees to conform to legal changes contemplated by the parties in negotiating the decree should rarely be granted.

Jost, 64 Tex. L. Rev. at 1136.

Petitioners' argument concerning changes in the population of the Suffolk County jail is similarly flawed. The facts concerning this issue, and its relationship to the consent decree, are set forth in detail in respondents' brief, and *amicus* will not burden the Court by repeating them here. The critical point is that single celling was an important premise of the relief respondents sought by the initial decree in 1979, and the importance of single celling was reaffirmed in subsequent litigation concerning modification of the consent decree to allow for the building of a larger jail in 1985. That litigation took place before Judge Keeton, and the important portion of the court's order stating that the proposed jail could be enlarged to any capacity "*provided that single cell occupancy is maintained,*" was a provision proposed *jointly* by petitioners and respondents. Joint Appendix 107 (emphasis in part in original). For petitioners to argue now that single celling was not a principal purpose of the decree is disingenuous — a fact which likely was not lost on Judge Keeton in denying the motion to modify.³

³ Perhaps to avoid this factual difficulty, petitioner Sheriff suggests that in assessing a request to modify the court should consider whether the modification will affect "the purpose of the consent decree, as defined by the constitutional, statutory or regulatory provision that occasioned the original intervention, as that provision may have been further defined or clarified by subsequent judicial

Even if petitioners could demonstrate the substantial threshold showing required, petitioners lose under a balancing of interests. In considering petitioners' request, Judge Keeton also considered the petitioners' good faith, and whether the proposed modification was in derogation of one of the principal purposes of the decree. Judge Keeton specifically found that the proposed modification would violate one of the decree's principal purposes — to secure "a separate cell for each detainee." Sheriff's Petition for Certiorari, at 12a. This is a factual finding which should be accorded deference both by the Court of Appeals and this Court. And although Judge Keeton made no specific findings concerning the Sheriff's good faith, the record abounds with facts, reflected in Judge Keeton's memorandum of decision, indicating a lack of same. Cf. Sheriff's Petition for Certiorari, at 12a ("Defendants' agreement in this case was a firm one, and not merely an agreement to comply with the decree if it was not too difficult to do so")

As for the public interest, *amicus* does not minimize the public interest in maintaining sufficient jail space to house all those pretrial detainees who are required to be incarcerated, so as not to release them prematurely. But those concerns existed as well in 1979, and in 1985. And as respondent's brief makes clear, the factual circumstances regarding the sufficiency of space are no different, and little more acute, than they were in 1985. Moreover, even assuming that circumstances have materially changed since that time, this is not a case,

decisions." Brief of Petitioner Robert C. Rufo, Sheriff of Suffolk County, at 12 (emphasis supplied).

Thus, the Sheriff suggests that in addressing whether the modification will derogate the decree's purpose, the "purpose" is not to be derived from what the parties intended, but from a subsequent evaluation by the court of the constitutional provisions at issue. Such a test would eviscerate all the contractual aspects of the consent decree, and would allow the government defendant to reopen the decree's "purpose" for review whenever it appeared opportune to do so.

like *Duran*, where a very limited modification will avoid serious public safety implications. As respondents' brief makes clear, here petitioners are proposing a radical and permanent change in the consent decree under circumstances where much less intrusive means for protecting the asserted public interest suggest themselves. Under a balancing of interests, Judge Keeton's rejection of the proposed modification was eminently reasonable.⁴

C. A District Court Should Not Be Obligated To Modify Or Vacate A Consent Decree Upon A Finding Of No Further Constitutional Violation

The argument of the Commissioner of Correction that the District Court was obligated to modify or vacate the consent decree upon a finding of no further constitutional violation should be explicitly rejected. The argument is dangerous in its simplicity, since it completely ignores both the nature of a consent decree as a consensual undertaking, and contrary decisions of this Court. The Commissioner's argument has two parts: first, that the modification should have been granted because "there is no constitutional violation at the new jail, nor is there any contention that conditions under the requested modification will violate the Constitution," and second, that the consent decree should be modified because the remedial provision — single celling — which petitioners now seek to revoke is not required by the Constitution, and a consent decree cannot "authorize federal courts to order state and local entities to perform acts not required by the constitution or federal statutes." Commissioner's Brief, at 43. Neither of these arguments have merit.

⁴Of course, if this Court determines that Judge Keeton did not apply the correct standard in assessing the request for modification, the appropriate result is to remand the case so that Judge Keeton can conduct such further proceedings as are necessary to apply the correct standard.

First, the Commissioner's argument that the remedies provided by the consent decree exceed the court's "equitable jurisdiction," also has two parts — (1) that the court could not have imposed the single celling obligation on the Sheriff if the case had been litigated through trial, and (2) that therefore it could not do so by consent decree. Both arguments are contradicted by the case law.

With respect to whether the remedies provided by a consent decree can exceed those that might be available after trial, that issue was addressed by Justice Brandeis the first time the consent judgment in *Swift* reached this Court. *Swift & Co. v. United States*, 276 U.S. 311 (1928) (*Swift I*). Justice Brandeis rejected the notion that the consent decree was void because it allegedly exceeded the scope of equitable remedies which would have been available if the case had been litigated through trial. *Id.* at 328-330. Subsequently, in *Swift II*, Justice Cardozo disposed of the same argument with characteristic insight:

The combination was to be disintegrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. *We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the Court.*

286 U.S. at 116 (emphasis supplied).

Thus, *Swift* itself rejects the argument that the relief provided by a consent decree must be congruent with the relief available

pursuant to a litigated decree. The interests described above in promoting settlement and finality of judgments dictate that this be so. A consent decree cannot be perpetually subject to collateral attack, and issues concerning the scope of an equity court's remedial powers are not "jurisdictional." Just as the running of an appeal period terminates the power to attack a litigated decree on such issues, a party's consent terminates its power to attack a consent decree.

The principles announced in *Swift* were recently reaffirmed by this Court in *Local 93 Int. Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 524-528 (1986), in which a majority of this Court held that the parties to a consent decree can voluntarily accept relief which the district court might not have been able to enter after trial. In *City of Cleveland*, this Court upheld a consent decree which provided for racial quotas in hiring firefighters, arguably in violation of § 706(g) of Title VII. Relying in part on the decisions in *Swift*, the Court held that "to the extent that the consent decree is not otherwise shown to be unlawful, the Court is not barred from entering a consent decree merely because it might lack authority under § 706(g) to do so after trial." *Id.* at 526.

In addition, there is no basis for petitioners' implication that the decree's single ceiling requirement was unauthorized because it went beyond strictly remedying the constitutional violation claimed by the plaintiffs. This Court addressed such an argument concerning the scope of available equitable remedies in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), which involved a remedial order in a school desegregation case. The petitioners in *Milliken II* argued that the court had exceeded its equitable powers by requiring the adoption of certain remedial educational programs as part of its desegregation plan. This Court rejected the argument, holding that a federal remedial decree is appropriate if it is aimed at eliminating a condition which violates the constitution, *or* it is aimed

at a condition which “flows from such a violation.” *Id.* at 282 (emphasis supplied). Thus, this Court held that where “a constitutional violation has been found, the remedy does not ‘exceed’ the violation if the remedy is tailored to cure the ‘condition that offends the Constitution.’” *Id.* (emphasis in original).

Here, of course, the District Court found in 1973 that a number of conditions of the old Suffolk County jail, including double celling, combined to create unconstitutional conditions of confinement. *Inmates of the Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 686 (D.Mass. 1973). The findings in that case, coupled with the lengthy history associated with the initial failure to respond to the Court’s orders, certainly would have justified a remedy which assured that constitutional violations did not recur. A remedial decree which provides for single celling of inmates under those circumstances “flows from” the constitutional violations found. This Court held as much in *Hutto*, 437 U.S. at 687-88, in which the Court upheld a detailed order intended to remedy Eighth Amendment violations at an Arkansas prison, including a provision limiting the time prisoners could be held in “punitive isolation.” The Court stated that “[i]n fashioning a remedy, the District Court had ample authority . . . to address each element contributing to the violation.” *Id.*

The Commissioner of Correction’s second argument — that the district court was obligated to modify the consent decree because the constitutional violation had ceased — is equally flawed. That argument appears to be based on this Court’s recent decision in *Board of Education of Oklahoma City v. Dowell*, 111 S.Ct. 630 (1991).

Dowell does not support the Commissioner’s contention. In *Dowell*, this Court held that the *Swift* standard did not apply to a motion by a school district to dissolve a litigated desegregation decree. There are three significant features of *Dowell* which render it inapplicable here. First, *Dowell* involved a

litigated decree, not a consent decree. The Oklahoma City Board of Education had never agreed to the particular remedies it was complying with, and so its request to be relieved from the decree did not implicate the federal concerns with promoting settlement and the integrity of federal court process. Second, *Dowell* was a school desegregation case, which this Court emphasized involved peculiar considerations of affirmative remedy, and special concerns about the need for “[l]ocal control over the education of children” *Id.* at 637. *Dowell* does not hold that *all* institutional reform decrees must ultimately be terminated, and it should not be read to say so.

Third, and perhaps most importantly, in *Dowell* the District Court had made specific findings “that the school board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and non-discriminatory,” and had further found it “unlikely that the school board would return to its former ways” *Id.* at 635, 636-637. In short, the district court had found no continuing threat from the discriminatory conduct which had given rise to litigation thirty years before.

Dowell does not hold that an injunction, even a litigated injunction, must be terminated the moment the constitutional violation it was directed at has ceased to exist. Many — indeed, most — injunctions immediately bring the party enjoined into compliance with the law, but the injunction does not thereafter necessarily expire. The injunction instead remains in effect because the fact that the party has once violated the law gives rise to a legitimate concern that he may do it again. In the words of Justice Brandeis in Swift I:

The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction

may issue to prevent future wrong, although no right has yet been violated.

276 U.S. at 326.

Petitioners are not entitled, merely by their nature as government defendants, to be relieved from the burden of an injunction as soon as they can prove compliance with the law. This is particularly true where the decree in question was entered by consent. Indeed, if one accepts petitioners' position, then they would be entitled to litigate (or relitigate) the issue of whether they are (or ever were) in violation of the Constitution at any time they choose. Moreover, since, under petitioners' theory, the only issue in such a challenge to a consent decree would be present compliance with the Constitution, petitioners would not even be required to show changed circumstances since the consent decree entered. The argument thus subjects consent decrees to perpetual exposure to collateral attack; it subverts the entire purpose of settlement and contract; and it has no place in a legal system appropriately concerned with finality.

IV. CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the District Court and the United States Court of Appeals for the First Circuit.

Respectfully submitted,

LORETTA M. SMITH
JOHN C. ENGLANDER*
PETER F. YOUNG
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109
(617) 570-1000

OZELL HUDSON, JR.
Lawyers' Committee for Civil
Rights Under Law of the
Boston Bar Association
294 Washington Street
Boston, Massachusetts 02108
(617) 482-1145

*Counsel for Amicus Curiae Lawyers' Committee For Civil
Rights Under Law of the Boston Bar Association*

**Counsel of Record*

